Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: J. CLEMILLE SIMON

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

1. QUESTIONS PRESENTED:

In this case petitioner has been charged with ethics violations, ironically for seeking to promote judicial ethics. Significantly, with respect to nearly all of the charges more "fact finders" involved in this process found no violation and recommended that all charges be dismissed, than did. Succinctly, plaintiff has been charged with making "knowing false statements of fact" relative to truthful allegations in a Motion to Recuse and an "assignment of error" and "hypothet" in an Appellate Writ application. In finding a violation, the Louisiana Supreme Court rejected the factual findings of the Hearing Committee and Disciplinary Board.

The Louisiana Supreme Court ignored the time honored "manifest error" standard of review and function of the Hearing Committee and Louisiana Disciplinary Board thereby rejecting the factual findings of its "eyes and ears", the Louisiana Hearing Committee (who actually saw and heard the witnesses and evidence) who found "identifiable evidence" warranting petitioner's recusal efforts and the factual findings of the Louisiana Attorney Disciplinary Board who found no violation warranting discipline and recommended that all charges be dismissed, one board member stating in a concurring opinion that it was "nonsense" to suggest a violation and that he was "more shocked" by the judicial behavior evidenced in the case. As a result, the Louisiana Supreme Court, in a split decision, has held that the Freedom of Speech embodied in the First Amendment does not apply to a lawyer's truthful allegations about a judge's perceived misconduct in seeking the judge's recusal. In ignoring the function of the Hearing Committee and Louisiana Disciplinary Board and the "manifest error" standard of review, the Louisiana Supreme Court, in a split decision, has equally held that Fourteenth Amendment Due Process also does not apply to lawyers, rendering the Louisiana Disciplinary Process a futile and costly exercise. Significantly, the Louisiana Supreme Court's rejection of

the factual findings of the Hearing Committee and Disciplinary Board that petitioner did not engage in misconduct warranting discipline rendered the entire process meaningless, costing petitioner in excess of $100,000.00 to successfully defend against the charges only to have the Louisiana Supreme Court abandon the "clear and convincing" burden of proof and eviscerate the factual findings of the Hearing Committee and Disciplinary Board supported by the overwhelming evidence in the record.

This matter arises from petitioner's efforts in representing clients and seeking recusal of a judge in two different cases (*Simon* and *Councelman* litigations). Both cases involved the same judge and same defense counsel. All of the charges arose as a result of pleadings filed in court and **not** as a result of "out of court" statements.

In the Simon litigation (no relation to petitioner) recusal was sought as a result of the judge's conduct over an eighteen-month period of time. Specifically, among others, the judge denied contradictory motions ex-parte without affording the litigants a hearing, set and decided defense motions while petitioner was out of the country, and made statements on the record and in court minute entries that were false and made in an effort to excuse his conduct. On numerous occasions the 3rd Circuit Court of Appeal granted writs and reversed. At the recusal hearing the judge provided testimony suggesting that on the occasions that he repeatedly denied motions ex-parte or scheduled the defense motions when petitioner was out of the country, he only did so after alleged conference calls between the parties. The judge further denied any knowledge of petitioner ever being out of the country. The judge was instrumental in the disciplinary charges being filed. Throughout the discovery phase of the disciplinary process the judge maintained the accuracy of his prior recusal testimony. Significantly, it was not until the disciplinary trial that the judge testified that no such conferences ever took place and then only after defense counsel testified that such conferences never occurred and the judge's law clerk's testified that the judge knew petitioner was out of the country because she had

personally told him so. The Hearing Committee found demonstrable and "identifiable evidence" substantiating plaintiff's allegations and justifying petitioner's efforts and recommended that the charges be dismissed. The Louisiana Disciplinary Board concurred noting, as did the Hearing Committee, the overwhelming record evidence and that the judge had recanted his prior sworn testimony.

In the Counselman litigation it was learned that the same judge had an attorney/client relationship with defense counsel who was defending against petitioner's client's case. Upon learning of this attorney/client relationship petitioner sought to disqualify defense counsel and recuse the judge/clients from deciding the issue of the disqualification. Petitioner's position was simply that an attorney cannot litigate before his judge/client and a judge/client cannot decide matters involving his attorney. The American Bar Association has published an opinion (Appendix H) critical of such an attorney/client relationship with a judge as have various Louisiana Courts.[1] In defense, it was asserted that the attorney only represented the judge in an "official capacity" and not personally and therefore the motion should be denied. It is important to note that as before in the Simon litigation the judge denied the contradictory motion ex-parte but in denying the motion ex-parte issued a minute entry denying the attorney/client relationship only to later admit to the relationship. Because of the defense of "official capacity" petitioner set forth in a brief to the Louisiana 3rd Circuit Court of Appeal a "hypothet" which was clearly and unmistakably identified as a "hypothet" wherein petitioner depicted the attorney attempting to call his judge/clients and speaking with them only if they were wearing their "official" black robe because as had been alleged as a defense, the attorney only represented the judge in an "official capacity". In other words, if the distinction of "official capacity" was valid then, consequently, there could be no discussions between the attorney and his judge/clients other than in their "official capacity". It was clearly

[1] *State v. Johnson*, 529 So. 2d 157 (la. App. 4th Cir. 1998); *Younce v. Pacific Gulf Marine, Inc.*, 827 So. 2d 1144 (La. 10/4/02).

set forth in the brief that the "hypothet" was designed to expose the frivolity of the "official capacity" defense. In other words, one cannot separate a judge's "official" persona from his "personal" persona because the appearance of impropriety is the same, if not worse, and therefore the distinction of "official capacity" was one that made no legal or practical difference. Notwithstanding that the disciplinary rules are "strictly construed" and notwithstanding that the "hypothet" by definition was fictional, not factual, petitioner was charged with making a knowing false statement of fact, the same charge that was filed against petitioner for the Simon recusal motion.[2] The Louisiana Disciplinary Board not only affirmed petitioner's innocence on all charges but in a concurring opinion one board member further stated that it was "nonsense" to suggest any violation and that he was "more shocked" by the judicial behavior evidenced in the case.

The following questions are therefore presented:

1. Does the Freedom of Speech embodied in the First Amendment apply to lawyers in the exercise of their duties and obligations to clients?

2. Does the right to Due Process embodied in the Fourteenth Amendment apply to lawyers in defense of charges of misconduct?

3. May a lawyer be the subject of discipline for truthful allegations in a judge's recusal motion or artful hypothetical debate relative to an affirmative defense seeking to justify a clearly inappropriate attorney/client relationship between the presiding judge and counsel in the case?

(A) Must a lawyer prevail on a Motion to Recuse to avoid discipline?

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[2] The same charge was made against petitioner for an "assignment of error" in the same Writ Application.

(B) Can a lawyer engage in hypothetical argument?

4. Is it possible to meet the "clear and convincing" burden of proof when the Louisiana Hearing Committee and Disciplinary Board find no violation warranting discipline and the Louisiana Supreme Court Justices cannot all agree?

(A) Doesn't the "clear and convincing" burden require at least some measure of consensus?

5. Is it possible that a lawyer can be found guilty of the charge of making a "knowing false statement of fact" when the allegations are true?

(A) Is it not incongruous to find guilt on the charge of making a "knowing false statement of fact" while at the same time specifically recognizing the absence of a "dishonest or selfish motive?" In other words, if a statement is "knowingly false" is not a "dishonest or selfish motive" implicated?

(B) Is it possible that a lawyer can be found guilty of making a "knowing false statement of **fact**" relative to a hypothet which by definition is fictional?

LIST OF PARTIES

The parties to this proceeding include petitioner and the Louisiana Attorney Disciplinary Board and/or the Louisiana Office of Disciplinary Counsel.

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OPINIONS BELOW

1. The opinion of the split Louisiana Supreme Court is reported I*n re Simon,* 913 So. 2d 816, 2004-2947 (La 06/29/05), rehearing denied. The rehearing was denied also by a split decision and is unreported. See Appendices "A" and "D".

2. The Louisiana Disciplinary Board Opinion is attached as Appendix "B."

3. The Louisiana Hearing Committee Opinion is attached as Appendix "C."

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. The judgment of the Louisiana Supreme Court was entered on June 29, 2005. A timely Petition for Rehearing was filed. (Appendices "E") The request for rehearing was denied on November 29, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Pursuant to Rule 14 (1) (f) the pertinent text is set forth in Appendix I.

1. The United States Constitution
   A. Amendment I
   B. Amendment XIV
2. The Louisiana Supreme Court Rule 19, § 18 (B)
3. The Louisiana Supreme Court Rule 19, § 18 (C)
4. The Louisiana Supreme Court Rule 19, § 18 (D)
5. The Louisiana Rules of Professional Conduct, Rule 8.2 (a)
6. L.S.A. - C.C.P. Art. 151 (B) (2) (5)
7. THE LOUISIANA CODE OF JUDICIAL CONDUCT:
   A. Canon I: A Judge Should Uphold the Integrity and Independence of the Judiciary

B. Canon II: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

C. Canon III: A Judge should Perform the Duties of the Office Impartially and Diligently.

STATEMENT OF THE CASE

1. PRELIMINARY STATEMENT:

The charges of misconduct in this case do **not** stem from a violation of any duty to a client or from any effort by petitioner to undermine the integrity of the legal system or the judiciary. To the contrary, these charges stem from petitioner's efforts to comply with his duty to his clients but equally with his duty to promote the administration of justice. More specifically, respondent sought to prevent unethical behavior and sought to promote the publics' perception of the legal system. Notwithstanding, formal charges were filed against petitioner on March 6, 2002. From the inception petitioner raised the issue of the constitutionality of the charges. Petitioner filed an Exception of No Cause of Action and a Motion for Summary Judgment on the basis of the constitutional prohibitions. The Exception and Motion for Summary Judgment were summarily denied. Petitioner filed a Writ of Mandamus on the constitutional issues with the Louisiana Supreme Court which was also denied. Trial before the Hearing Committee encompassed 3 days. As a result of the trial the Hearing Committee recommended that charges be dismissed finding "identifiable evidence" warranting petitioner's efforts to recuse the presiding judge (count I) and finding that petitioner's "assignment of error" (count III) was not a violation of any ethical rules. The Louisiana Hearing Committee found the use of the "hypothet" (count II) to be a violation. The Hearing Committee issued its findings of fact and recommendations on March 5, 2004.

The Louisiana Office of Disciplinary Counsel appealed the hearing committee's dismissal recommendations to the Louisiana

Attorney Disciplinary Board.[3] Petitioner appealed the hearing committee's finding relative to the use of the hypothet. Petitioner again placed at issue the constitutional prohibitions. The matter was taken up on May 26, 2004. On November 4, 2004, the Disciplinary Board issued its findings of fact and recommendations. The Disciplinary Board affirmed the Hearing Committee's findings of fact and recommendations relative to petitioner's efforts to recuse the presiding judge and the "assignment of error" and reversed the Hearing Committee on the issue of the "hypothet" finding that the use of the "hypothet" was not a violation warranting discipline and recommended that all charges be dismissed. Significantly, in a concurring opinion one board member stated that the presiding judge "showed a clear bias and a thorough disregard for the rules of procedure" specifically noting that the presiding judge recanted prior sworn testimony previously provided as an excuse for the judicial behavior which prompted the filing of the recusal motion. Significantly, this board member further stated that it was "nonsense" to assert any violation by petitioner and that he ultimately was "more shocked at the judicial behavior evidenced in this case" and concurred that all charges be dismissed.

The Louisiana Office of Disciplinary Counsel appealed the Disciplinary Board's findings and recommendations to the Louisiana Supreme Court.[4] Petitioner again raised the constitutional protections prohibiting punitive action. In an "unprecedented"[5] step,

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[3] The concept of "double jeopardy" apparently does not apply in lawyer discipline cases.

[4] Chief Disciplinary counsel is appointed by the Supreme Court justices. It was not until the day of oral argument before the Supreme Court that the Chief Disciplinary counsel made an appearance in this case. There exist correspondence, however, by the Chief Disciplinary Counsel to the Supreme Court Justices concerning this matter even before any charges were ever filed.

[5] The fact of the Louisiana Supreme Court rejecting the factual findings and recommendations of both the Hearing Committee and the Disciplinary Board is extra ordinary. Furthermore, as noted by the President of the Louisiana State Bar Association, Mr. Frank Neuner, the fact of the issuance of discipline in this case was

the Louisiana Supreme Court abandoned the "manifest error"[6] standard of review of the factual findings of its "eyes and ears" and in a divided court reversed the findings and recommendations of the Hearing Committee and the Disciplinary Board imposing discipline.[7] See for example where the Louisiana Supreme Court stated ". . . we have held the 'manifest error' standard is applicable to the committee's factual findings. *In re: Caulfield*, 96-1401 (La. 11/2596), 683 So. 2d 714; *In re: Bardue*, 93-2865 (La. 3/11/94), 633 So. 2d. 150." *In re: Small*, 863 So. 2d. 500 (La. 12/3/03); " . . . we have **rarely** rejected the factual findings of the committee, observing that the committee 'acts as eyes and ears of this court and is in a **superior** position to observe the nuances of demeanor evidence not revealed in a record'. *In re: Bolton*, 02-0257 (La. 6/21/02) 820 So. 2d. 548, 553". *In re: Small*, 863 So. 2d. 500 (La. 2003)*/* ". . . we place **great** emphasis on the findings of the members of the Hearing Committee. . ." and "unlike the Disciplinary Board and this court, the Hearing Committee was not disadvantaged by the review of the cold record and is in a **superior** position to observe the nuances of **demeanor evidence** not revealed in a record" and ". . . we are **not prepared** to **disregard** the **credibility evaluations** made by those **committee** members who were present during respondent's testimony and who act as the eyes and ears of this court". *In re: Bolton*, 820 So. 2d. 548 (La. 6/21/02); ". . . we generally **defer** to the factual findings of the Hearing Committee members who act as the eyes and ears of this court. [citations omitted]" and ". . . the manifest error standard requires the reviewing court to determine not whether

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"unprecedented".

[6]The Louisiana Supreme Court has consistently held that the "manifest error" standard applies. *In re: Small*, 863 So. 2d. 500 (La. 2003). *In re: Bolton*, 820 So. 2d 548 (La. 2002); *In re: L.D. Sledge*, 859 So. 2d 671 (La. 2003); *In re: Warner*, 851 So. 2d 1029 (La. 2003)

[7]The discipline imposed is suspension for 6 months with all but 30 days deferred, enrollment in Ethics school, and all costs of the proceedings and 1 year probation. Petitioner has likewise been suspended from practicing in the Federal Court system. The Supreme Court opinion suggests the Court's action meets constitutional muster.

the trier fact was right or wrong, but whether the fact finders conclusion was a reasonable one." And, "... **reasonable evaluations of credibility** and **reasonable inferences of fact should not be disturbed upon review**. . ." *In re: Sledge*, 859 So. 2d. 671 (La. 10/21/03); see also *In re: Warner*, 851 So. 2d. 1029 (La. 6/27/03).

Interestingly, although the divided Louisiana Supreme Court found petitioner guilty of making a "knowing false statement of fact" the Supreme Court specifically noted the absence of any "dishonest or selfish motive." Even more interesting is the fact that the truthfulness of petitioner's allegations are supported by the actual record in the nature of tangible "identifiable evidence" such as trial court minute entries, written rulings, court transcripts, and appellate court writ grant opinions wherein the appellate court repeatedly reversed the trial judge because of his conduct.[8] In ignoring the function of the Hearing Committee and Disciplinary Board, and the "manifest error" standard of review and/or deference typically accorded the Court's "eyes and ears," the Supreme Court ignored the overwhelming body of evidence, reversed, and issued its opinion on June 29, 2005. The Supreme Court's excuse for the judge's recanted testimony that he was simply "mistaken" because judges handle a large "number of cases" defies the record as does every aspect of the court's decision. Significantly, the trial judge testified he "quite vividly" recalled and remembered "very, very well" that which he later testified **never** occurred. The Supreme Court's "eyes and ears" in exercising their court appointed function assessed the demeanor of the witness and ultimately credibility, finding "identifiable evidence" warranting the judge's recusal and finding no violation. Petitioner requested a rehearing which was ultimately denied on November 29, 2005 although two justices would have granted the rehearing.

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[8]The Supreme Court excused the trial judges recanted sworn testimony suggesting that judges are busy. Yet, the Supreme Court did not mention all of the judge's other false statements in minute entries or on the record which were shown to be false, evidence of which was characterized by the Hearing Committee as "identifiable."

II. PETITIONER'S BACKGROUND

Petitioner comes from a family of lawyers. His father, J. Minos Simon (recently deceased on March 11, 2004), was co-counsel in these proceedings and was a practicing attorney for nearly 60 years. Petitioner is one of three sons (J. Minos Simon, Jr., J. Clemille Simon and J. Quentin Simon) all of whom are practicing attorneys in the State of Louisiana. Anyone familiar with this family knows of their honesty, integrity and duty to clients.[9] Indeed, it is because of these attributes that petitioner has been forced to endure the brunt of these disciplinary charges. It was long ago instilled in petitioner by his father the virtues of the law and the corresponding professional duty and obligation owed by a lawyer to his clients and equally to the legal profession. Indeed, in appearing before the Honorable United States Supreme Court, then Chief Justice Earl Warren once applauded respondent's father for his legal efforts in the case before the Court by stating "Mr. Simon, I want to say for the record that with lawyers like you this Nation is in good hands." As his father before him, petitioner's only motivation was to comply with his duty to protect his clients. Petitioner's only desire was to promote the independence and integrity of the judiciary while at the same time promoting the fair administration of justice. One would rightly expect that the Rules of Professional Conduct, as originally intended, were not designed to punish lawyers that speak truthfully in seeking to promote the public's trust in the legal system.

III. REASONS FOR GRANTING THE WRIT

This case presents fundamental and substantial questions concerning the impermissible constitutional violations including First Amendment Freedom of Speech and Fourteenth Amendment Due Process. This case has and will continue to have a chilling effect on

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[9]Numerous judges, both appellate judges and local district judges, testified in this matter. Almost without exception, the judges testified to petitioner's honesty, integrity and duty to his clients. Indeed, the Louisiana Supreme Court specifically noted the lack of any "dishonest or selfish motive."

lawyers in Louisiana and elsewhere.

The U.S. Supreme Court has spoken to Freedom of Speech in the context of civil litigation, criminal prosecution and "out of court" commentary but has not (to this writer's knowledge) addressed Freedom of Speech and Due Process in the context of discipline for truthful "in court" allegations. The Louisiana Supreme Court's ruling conflicts with the U.S. Fifth Circuit and the jurisprudence of the U. S. Supreme Court.

PETITIONER'S RECUSAL MOTION COUNT I - CHARGES ARISING FROM RECUSAL MOTION

This court has spoken to the First Amendment Freedom of Speech in the context of civil and criminal proceedings. In *New York Times Co., vs. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2nd 686 (1964) and *Garrison vs. The State of Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2nd 125 (1964) the United States Supreme Court made it clear that speech is protected, even if untruthful.[10] In *New York Times* the court ruled that civil damages can only be made for false statements and only if the false statements were made with actual malice, that is, with the knowledge that it was false or with reckless disregard for whether it was false or not. Garrison was rendered subsequent to *New York Times.* The court in Garrison extended the New York Times rule to criminal proceedings. In the Garrison case District Attorney Jim Garrison had criticized the judges of Orleans Parish with remarks related to their perceived inefficiency, laziness, and excessive vacations. Garrison also accused the judges of hampering his efforts to enforce vice laws. In extending the New York Times civil law standards to apply in a criminal setting the court in *Garrison* stated:

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[10] In the matter *In re: Sawyer,* 360 U.S. 622, 79 S. Ct. 1376, 3L. Ed. 2d 1473 (1959) this Honorable Court rejected a similar effort to sanction a lawyer. Significantly at issue in *Sawyer* was "out of court" comments made by an attorney, not "in court" allegations made in court pleadings as here.

"It would give public servants unjustified preference over the public they served, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."

The court further provided:

"The Constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. **Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs are concerned. And since . . . erroneous statement is inevitable in free debate, and . . . that must be protected if the freedoms of expression are to have the 'breathing space' that they 'need. . . to survive', 376 U.S., @ 271 - 272, 84 S. Ct. @ 721, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principals that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement caustic and sometimes unpleasantly sharp attacks on government and public officials'."**

The *Garrison* court further stated:

"*The New York Times* rule is not rendered inapplicable merely because an officials private reputation, as well as his public reputation is harmed. The public official rule protects the

> paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an officials fitness for office is relevant. Few personal attributes are more germaine to fitness for office than dishonesty, malfeasance, or improper motivation, even though such characteristics may also effect the officials private character."

This Court has identified disciplinary proceedings as "quasi criminal". *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2nd 117 (1968). Consequently, if the First Amendment protections prevent imposition of civil damages and criminal prosecution, it certainly should apply to lawyers in the disciplinary arena. Significantly, in *Sawyer*, supra, this court protected out of court statements made by a lawyer and reversed the imposition of discipline. Interestingly, even though Justice Frankfurter, Justice Clark, Justice Harlan, and Justice Whittaker dissented, in doing so, these Justices recognized the Constitutional protection afforded lawyers relative to criticizing a court pursuant to "in court" pleadings. In doing so Justice Frankfurter, writing for the minority, stated:

> "[a lawyer] does **not** lack for a **forum** in which to make his **charges** of unfairness or failure to adhere to principals of law; **he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded.**
>
> Certainly courts are **not** and **cannot** be, **immune** from **criticism**, and **lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in**

doing so."[11] *[emphasis added]*.

To fully grasp the gravamen of the Supreme Court's violation a brief sojourn into the law of recusation is in order. Impartiality is the quintessential of justice. There are many decisions across the nation which address the need for the fair and impartial administration of justice and the duty of a lawyer to insure that his client receives the benefit of the fair and impartial administration of justice as guaranteed by both the Louisiana and United States Constitutions. For example, *U.S. v. Cooper*, 872 F.2d 1 (1st Cir. 1999) exists as an exemplar of the lofty ideal of the fair administration of justice and the corollary professional duty of a lawyer. Said the court in *Cooper*:

> "...the fair administration of justice provides a valuable right to challenge in good faith the neutrality of a judge who appears to be biased against a party. **Lawyers using professional care, circumspection and discretion in exercising that right need not be apprehensive of chastisement or penalties for having the advocate courage to raise such a sensitive issue to assure the client's right to a fair trial and the integrity of our system for administering justice."** *Id p. 5*

A lawyer's duty to protect his clients against bias has to be the least palatable and the most demanding challenge which a lawyer is compelled to confront. For months, petitioner considered the filing of the Motion to Recuse. The motion was ultimately prepared and sat on his desk for several more months. The Hearing Committee found this to be a fact. An impartial judiciary is aware of this discomfort and challenge. The *Cooper* court spoke to this dilemma in these words:

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[11] Ironically, the Louisiana Supreme Court cites to *In re: Sawyer* as support for the imposition of discipline for petitioners in court pleadings.

> "A motion to recuse a trial judge is inherently offensive to the sitting judge because it **requires** the moving party to **allege** and **substantiate bias** and **prejudice** - traits contrary to the impartiality expected from a mortal cloaked in judicial robe. Yet, the fair administration of justice **requires** that lawyers challenge a judge's purported impartiality when facts arise which suggests the judge has exhibited bias or prejudice. The appropriate mechanism for such a challenge is a motion to recuse." *Id p. 4* (Emphasis added).

The United States Supreme Court has embraced the juridical sentiment of the Cooper court. In *Holt v. Virginia*, 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965) the Supreme Court, recognizing the demands of due process and touching upon the question of judicial bias, reminded the bench and bar as follows:

> "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. And since a fair trial in a fair tribunal is a basic requirement of due process, motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential." *Id p. 293-294* [citations omitted]

Should a lawyer who undertakes to carry out his duty to his clients and to the administration of justice be sanctioned or punished for doing so? If so, have we amended the rules for recusation of judges or have we made the remedy unattainable? What lawyer will demonstrate the depth of character and dedication to duty by filing a motion to recuse for apparent bias of a judge where to do so will expose him to disciplinary punishment? If such a condition comes to pass it will be on the ruins of the rights of the citizens of Louisiana to a fair and impartial administration of justice.

LSA - C.C.P. Article 151 provides that a judge be recused when he is "**biased, prejudiced,** or interested in the cause or its outcome or **biased** or **prejudiced toward** or **against** the **parties** or the **parties attorneys** to such an **extent** that he would be **unable** to **conduct fair** and **impartial proceedings**."[12] The Code of Judicial Conduct, Canon II, **mandates** that a "judge **shall respect** and **comply** with the **law** and **shall** act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and that a "**judge shall not** allow family, social, **political** or **other relationships** to **influence judicial conduct** or **judgment**." Canon III **mandates** that a "**judge shall** be **faithful** to the **law** and **maintain** professional **competence** in it", that a "**judge shall perform** judicial **duties without bias** or **prejudice**" and that a "**judge shall dispose** of all **judicial matters** promptly, efficiently and **fairly**." Moreover, and perhaps most importantly, Canon III **mandates** that a "**judge shall disqualify** himself or herself in a proceeding in which the judge's **impartiality might reasonably** be **questioned** and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule."

The United States Supreme Court has long held that our judicial system must endeavor to prevent even the possibility of unfairness. Not only must a judge actively be impartial, he must convey the appearance of impartiality. *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). All motions to recuse should be "evaluated on an **objective** basis, so that what matters is not the reality of bias or prejudice **but its appearance**." *Liteky*. The

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[12] "A...Judge is not, and should not be, immune from questions about impartiality or other misconduct. The lack of such immunity is amply demonstrated by the mere existence of [C.C.P. Article 151, et seq.]. And indeed, if the trial judge had made the statements asserted here, there was certainly good reason for respondent to be concerned about bias and to consider recusal." In re Order to Show Cause, 741 F. Supp 1379 (N.D. Cal 1990)

Supreme Court in *Liteky* embraced the quintessential notion of fairness consistently championed by the United States Supreme Court and postulated by the court in *In Re Murchison*, in the following words:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. **But our system of law has always endeavored to prevent even the possibility of unfairness**. To this end no man can be judged on his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. **Circumstances** and **relationships** must be considered. This Court has said, however, that every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the state and the accused **denied** the latter of due process of law. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. **But to perform its high function in the best way justice must satisfy the appearance of justice.**" (Emphasis supplied.) *In re Murchison*, 289 U.S. 1333, 1336, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1965).

The United States Fifth Circuit Court of Appeal had the occasion to address the lofty ideals of impartiality and fairness with respect to motions to recuse in *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976). In a per curium decision the court discussed the overriding importance of not just an impartial tribunal, but also the importance of the **appearance** of an impartial tribunal, stating:

> "The truth pronounced by Justinian more than a thousand years ago that, '**impartiality is the life of**

justice,' is just as valid today as it was then. **Impartiality finds no room for bias or prejudice.** It countenances no **unfairness** and **upholds no miscarriage of justice**. Bias and prejudice can deflect the course of justice and effect the measure of its judgments. **If the judge finds himself possessed of those sentiments, he should recuse himself; or, if he does not, confront the likelihood of proceedings under the statute to require him to do so."** (Emphasis added).

In *U.S. v. Jordan*, 49 F. 3rd 152, 155-156 (5th Cir. 1995), the 5th Circuit again discussed the importance of the objective standard required in recusal motions, stating:

> "Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself..."

The 5th Circuit further held:

> "*Liljeberg* held that section 455(a) is an objective inquiry. This is essential when the question involves appearance. Therefore, we ask how things appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and suspicious person.... Judge must ascertain how a reasonable person would react to the facts. Problematic is the fact that judges do not stand outside the judicial system; they are intimately involved in the process of obtaining justice. **Judges who are asked to recuse themselves are reluctant to impune their own standards. Likewise, judges sitting in review of others do not like to cast aspersions**. 'Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under section 455(a) into a

> demand for proof of actual impropriety.' **Accordingly, we are mindful that an observer of our judicial system is less likely to credit judges impartiality than the judiciary."** (Emphasis added).

Significantly, the Louisiana Supreme Court has held that a legal ruling which is contrary to clear and determined law about which there is no confusion or question, and, while not made in bad faith, but made as part of a pattern or practice of legal error, can constitute misconduct. *In re: Judge Perrell Fusilier*, 2003 W.L. 183554 (La. 2003). As the motion to recuse and chronology submitted by petitioner in this case reveals, the trial judge engaged in a pattern or practice of legal error contrary to the clear and determined law about which there was no confusion or question. For example, the judge denied petitioners the right to a hearing on numerous contradictory motions and assessed plaintiffs with attorney's fees in matters where attorney's fees were not authorized and in a matter where plaintiffs prevailed. It is axiomatic that attorney's fees are only available when specifically authorized by contract or specific statutory provision.[13] A single instance of egregious legal error particularly one involving denial to individuals of their basic or fundamental rights may amount to judicial misconduct. *In re: Justice of the Peace Lawrence Landry*, 789 S.2d 1271 (La. 6/29/01). Intentionally refusing to follow law constitutes legal error made in bad faith and may also be grounds for a finding of judicial misconduct. *In re: Justice of the Peace Lawrence Landry*, 789 S.2d 1271 (La. 6/29/01). The Louisiana Supreme Court further noted in *Landry* that the United States Constitution and the Louisiana State Constitution guarantee an individual the right to due process of law. It was further noted that procedural due process requires an opportunity to be heard, in addition to notice of the pendency of an action against an individual. As revealed by the record in the *Simon*

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[13] *Charbono v. Steve Lang and Son Loggers*, 696 So.2d 1382 (La. 1997); *General Motors Acceptance Corporation v. Meyers*, 385 So.2d 245 (La. 1990); *Devillier v. Fidelity and Deposit Company of Md.*, 709 So.2d 277 (La. App. 3rd Cir. 1998).

litigation and this record and as alleged in the motion to recuse, the presiding judge repeatedly deprived the Simons of their basic fundamental due process rights to a hearing by denying contradictory motions ex parte and/or setting contradictory motions for hearing on the same date of trial or when petitioner was out of the country.[14] This record is replete with examples of the judges conduct which, according to the Louisiana Supreme Court, can amount to judicial misconduct worthy of some form of reprimand and/or sanction. In the matter entitled *In re: Judge Leon L. Emanuel, III*, 755 So.2d 862 (La. 4/13/99), the Supreme Court held that a judge's failure to issue scheduling orders or conduct status conferences amounted to misconduct warranting public censure. As revealed by the record, although a scheduling order was in effect, the judge repeatedly did not enforce its provisions and allowed the defendants to conduct virtually all discovery in violation of the scheduling order and more importantly, in violation of a local rule **and** defense counsel's certification that discovery was complete.[15] The refusal to enforce scheduling orders is no different than failing to issue scheduling orders.

As reflected by the record, the Motion to Recuse and hearing transcript, the trial judge repeatedly engaged in conduct that the Louisiana Supreme Court has held to be misconduct. This conduct, at the very least, revealed a potential bias and/or prejudice in violation of both C.C.P. Article 151 and the Judicial Canons aforementioned. The Third Circuit **repeatedly** reversed the judge's refusal to afford to plaintiff's clients even basic due process. The Motion to Recuse was denied which reveals the effectiveness of the trial judges testimony of the alleged "conference calls" which he later recanted. However, the denial of the motion does not translate into

[14] Third Circuit reversed Judge Rubin repeatedly.

[15] The Third Circuit reversed on one occasion and ordered a hearing because defense counsel may have violated Article 863 and the local rule in prematurely setting the case for trial by falsely certifying that discovery was complete.

evidence of an ethical violation. *U.S. v. Cooper*, 872 F.2d 1 (1st Cir. 1999).

LSA-C.C.P. Article 154 requires the filing of a motion therein containing the alleged grounds for recusal. As set forth by the court in *Couvillion v. Couvillion*, 769 So.2d 747 (La. App. 5th Cir. 9/26/00), a party seeking to recuse a judge cannot merely allege lack of impartiality; he must present some **factual basis**. Most notably, the court stated that bias, prejudice, or personal interest that warrants recusal of a judge must be of a **substantial nature** and **based on more than conclusionary allegations**. As set forth in *Tamporello v. State Farm Mutual Automobile Insurance Company*, 665 So.2d 503, (La. App. 5th Cir. 11/15/95), mere conclusory allegations are insufficient and the factual particulars of a "**substantial nature**" must be set forth. The *Tamporello* court further provided that when a motion to recuse does not set forth affirmative allegations of fact stating valid grounds for recusal that the trial court may **"overrule"** the motion without referring the matter to another judge.[16] The allegations set forth in the Motion to Recuse were not only truthful allegations supported by tangible "identifiable evidence" in the record, but required to be set forth by Louisiana's procedural and subsitive law relative to recusation motions in order to avoid the summary denial of the motion.

The following analysis and jurisprudence on the other issues also apply to this issue.

PETITIONER'S USE OF THE HYPOTHET COUNT II --- CHARGES ARISING FROM RESPONDENT'S USE OF A HYPOTHET RELATIVE TO THE ATTORNEY/CLIENT RELATIONSHIP BETWEEN THE JUDGE AND DEFENSE COUNSEL

Count II relates to a hypothetical illustration contained in a writ application filed with the Louisiana Third Circuit Court of

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[16] See also *Louisiana State Board of Medical Examiners v. Golden*, 645 So.2d 690 (La. App. 4th Cir. 9/29/94).

Appeal in the *Counselman* matter. In the *Counselman* matter, a motion to disqualify defense counsel and recuse the judges was filed objecting to the attorney/client relationship existing between the judges and defense counsel.

Respondent's client sought to disqualify defense counsel and recuse the judges because the attorney/client relationship created a conflict of interest and was otherwise unethical.[17] Defense counsel advanced the defense that he and his firm represented the judges personally but in an "official capacity" as judge as opposed to some other capacity. In doing so, defense counsel attempted to distinguish the attorney/client relationship from that of any other attorney/client relationship and in doing so attempted to re-characterize the nature, extent and scope of the relationship. Thus, because of the "official capacity" defense, what was otherwise a simple issue of whether or not the "appearance of impropriety" was created by virtue of the attorney/client relationship became much more complicated and convoluted. In other words, the "official capacity" defense became an issue and a matter of debate for which opposing views were held. In short, it was a relevant issue.

In order to preserve the impartiality and fairness required in the administration of justice the judiciary must, at all times, remain independent from the lawyers bar. In this regard, Code of Judicial Conduct, Canon I, provides that "an **independent** and **honorable judiciary** is **indispensable** to **justice** in our society." Canon I further provides that a judge "should participate in establishing, maintaining and enforcing, and shall personally observe, **high standards** of conduct so that the **integrity** and **independence** of the **judiciary** may be **preserved**" and that "the provisions of this Code are to be **construed** and **applied** to **further** that **objective**." The Court is further referred to the Canons previously mentioned in this Writ. The Rules of Professional Conduct prohibit a lawyer from

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[17] As revealed by *State v. Johnson*, 529 So.2d 157 (La. App. 4th Cir. 1988) the 4th Circuit has deemed it to be a violation of he Rules of Professional Conduct for an attorney who receives a salary from judges to practice law before those judges. See also ABA opinion which is part of this record (Appendix H)

engaging in the representation of a client when a conflict of interest exists and otherwise provides guidelines for what is considered to be misconduct. The Louisiana Supreme Court disciplined Judge Sylvia Cooks of the Third Circuit Court of Appeal for, among others, failing to disclose an attorney/client relationship existing between Judge Cooks and an attorney. *In Re Cooks*, 694 So.2d 892 (La. 1997). In speaking to the relationship the Louisiana Supreme Court stated:

> "Article 151B(2) mandates that if a Judge has continued to employ to represent him personally an attorney who is also representing a party in a matter pending before that Judge, the Judge **must** disclose this representation to all the parties in a matter pending before him. This mandatory obligation exists so that all parties will have the **information** necessary to determine if they should request that the Judge be **recused**. **Clearly, failure to make this disclosure when an attorney/client relationship exists could subject a judge to discipline**." *Id. p. 900, 901.* See also *In Re Lemoine*, 692 So.2d 358 (La. 1997).

Again, the Supreme Court addressed this issue in *Younce v. Pacific Gulf Marine, Inc.*, 827 So.2d 1144 (La. 10/4/02) wherein the Supreme Court reaffirmed the fact that judges must disclose the existence of an attorney/client relationship.

> "The disclosure requirement is **mandatory**, providing a bright line rule that judges are required to follow."

The Supreme Court further stated that it was unnecessary for courts to engage in "**evaluating** the **roles** the **attorney played** in **representing** the **judge** and the **status** of that **litigation** because Article 151 provides a **mandatory** rule regarding when disclosure is required." The Supreme Court in *Younce* held that the motion to recuse because of the attorney/client relationship should have been **granted** and as a result ordered a new trial and the reassignment of

the case.

The Court in *State v. Johnson* further stated:

> "Additionally, the Rules of Professional Conduct, which apply to all members of the Louisiana Bar Association, prohibit the attorney from engaging in the conduct disapproved by the judge in this case. Although this exact situation is not addressed by the Rules, conflicts of interest are discussed and prohibited by Rules 1.7, 1.8 and 1.9. Certainly representing clients in a court which currently pays one's salary could easily result in an actual or, at least, perceived conflict of interest.
>
> The Rules of Professional Conduct further provide that it is professional misconduct for an attorney to "state or imply an ability to influence improperly a judge." An attorney of record in one section of a court, who represents a client in another section, is in a position to consciously or unconsciously imply that he is able to influence a judge. Attorneys should not be engaged in any activities which could result in violation of any of the rules governing professional responsibility." *Id p. 158*

The hypothetical included within the *Counselman* writ application was clearly identified as such. Being "hypothetical" it was the antithesis of factual. Not being factual, it cannot logically be the basis for the claim that it was a "knowing false statement of fact". The "hypothetical" was nothing more or less than defense counsel's "official capacity" defense carried to its logical conclusion. In other words, the person of a judge is inseparable from that of the individual. In asserting the "official capacity" defense, defense counsel created the absurd image of his judge clients as human beings biologically and physiologically divisible in kind. On the one hand, defense counsel contended that his judge client existed as a personal human being separate and distinct from a claim that his

judge client also existed as an "official" human being. In presenting such an "official capacity" defense, defense counsel robbed each of his judge clients of the judge's integrated wholeness as a human being. To further complicate matters, the judge's counsel built upon his invented dichotomy by arguing that since he represented his judge clients in their "official capacity," it was therefore impossible for his judge clients to have a **personal** bias; therefore, it was inconceivable, if not insulting, for the assertion to be made that such an attorney/client relationship created the "appearance of impropriety" requiring disqualification. In other words, it was contended that the inherent bias that comes from an attorney/client relationship could not migrate from the judges' "personal" persona to the judges' "official" persona and visa versa. Thus, in light of the defensive posture (i.e., "official capacity") the exploitation of this absurd position was very much relevant. The hypothetical was designed to illustrate that it makes no difference whether an attorney represents a judge in an "official capacity" or any other capacity to the extent that the issues deemed relevant by the Supreme Court in *Cooks* and *In re: Lemoine,* 692 So. 2d. 358 (La. 1997) (i.e., nature and extent of relationship, frequency of contact, frequency of telephone calls and duration of telephone calls, etc.) were nevertheless present. That, if the "official capacity" defense were carried to its logical end no conversation could ever have occurred between defense counsel and his judge clients unless they were wearing their "official" judicial robes.[18] Accordingly, the hypothetical colloquy between defense counsel and his judge clients was merely an attempt to **graphically** portray the absurd imagery of the "official capacity" defense. As such, the hypothetical colloquy was relevant to the issues presented.[19] Being **fictional** it cannot logically be construed as being factual and thus cannot exist in violation of any disciplinary rule that is premised upon the making

[18] The judicial "black robe" is the only thing that distinguishes a judge in his/her official capacity.

[19] The Louisiana Supreme Court's suggestion that the hypothet was not relevant is confusing. The subject of the hypothet was precisely the issue.

of knowing false statements of fact or law.[20]

Every litigant has the right to the effective assistance of counsel and the greatest latitude should be allowed in advocating the rights of litigants. The lawyer's right and responsibility of zealous advocacy is and ought to be protected speech. *NAACP V. Button*, 371 U.S. 451, 83 S. Ct. 328, 9 L. Ed. 2d 405; *In Re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 417. Certainly the client's right to the assistance of counsel is protected. As stated by the Supreme Court for the State of Mississippi "we regard the lawyer's right and responsibility of zealous advocacy on behalf of his client among the most precious forms of speech." *Thornton v. Breland*, 441 So.2d 1348, 1350 (Ms. 1983). Disciplinary rules must be strictly construed resolving ambiguities in favor of the person charged. **Attorneys should be free to challenge in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such challenge as an assault on the integrity of the court**. *United States v. Brown*, 72 F. 3rd 25 (1995). In speaking to Rule 8.2 of the Louisiana's Rules of Professional Conduct the Fifth Circuit Court of Appeal stated that:

> "Nothing in this or the other comments to the rule intimates that the rule is to be applied, as it was by the district court, to a lawyer's criticism of a judge's handling of a trial in which the lawyer was involved made in papers filed with that same court in the same proceeding. Rather, the comments suggest that the rule is primarily a prohibition on comments made to the **public** that would undermine public confidence in the administration of justice." *Id pg. 29.*

The Fifth Circuit further provided that Rule 8.2 is designed **"solely"** to proscribe **false** or **reckless** statements questioning judicial qualifications or integrity. Clearly, the hypothetical was the exercise

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[20] Disciplinary rules are strictly construed resolving ambiguities in favor of person charged. *U.S. v. Brown, Supra.*

of petitioner's right and duty to engage in artful debate and argument to secure and vindicate the rights of his client.[21] The Louisiana Supreme Court's ruling in this case is at drastic odds with the U.S. 5th Circuit and United States Supreme Court Jurispducence.

C. PETITIONER'S "ASSIGNMENT OF ERROR"

In Count III, it was also alleged that petitioner made a "knowing false statement of fact" with respect to an "assignment of error" included within the Writ Application to the Louisiana Third Circuit. The rules of appellate procedure require assignment of error. As required, petitioner pointed out the error in trial Court's decision. It was the decision that was challenged, not the judge. When the assignment of error is read in its entirety, it is clear that the ruling of the court was being challenged as being in violation of controlling legal authority and in violation of the principles of honesty and fundamental fairness upon which our judicial system is based. Considering the jurisprudence, the facts and the ABA opinion, the assessment of the court's ruling as existing in violation of controlling legal authority and the principles of honesty and fundamental fairness upon which our judicial system is based was an accurate assessment.

> As the United States Supreme Court stated in *Garrison:*
> "The First and Fourteenth amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include the vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

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[21] Even the jurisprudence on Rule 11 and LSA-C.C.P. Art 863 (Louisiana's Rule 11 counterpart) speak to a lawyers "creativity" as being the "lifeblood of the law" and that where there is even the "slightest justification" for the "assertion or argument sanctions are not warranted."

The Hearing Committee and the Disciplinary Board again found no violation and recommended that this charge be dismissed. The Hearing Committee found as a fact that none of the Third Circuit Court of Appeal judges that testified found the assignment to be unethical. And, as the transcript of the hearing reveals, the judges of the Third Circuit Court of Appeal found the assignment of error to be no different than that which they routinely see on a day-to-day basis. Rule 8.2 (that which petitioner is charged) is predicated upon a knowing false statement or a statement made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, a judicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. The assignment of error was not a knowing false statement or a statement made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. The assignment of error challenged the correctness of the trial court's ruling. The Hearing Committee and the Disciplinary Board not only found no violation but as relates to all the charges found the **absence of malice**. Significantly, the Louisiana Supreme Court also specifically found the absence of a **"dishonest or selfish motive."** As such, there can be no violation of Rule 8.2 because Petitioner did not make a knowingly false statement concerning the court's qualifications or integrity as a judge but merely assigned error to the denial and characterized the denial as existing in violation of controlling legal authority and the very principles "honesty and fundamental fairness" upon which our judicial system is based. As the jurisprudence, the ABA opinion and the facts demonstrate, the position adopted by petitioner on behalf of his clients was entirely accurate.

Petitioner's sole objective was to enhance the public's perception of the judiciary by seeking to prevent the court and opposing counsel from engaging in an attorney/client relationship deemed by the Louisiana courts and the American Bar Association to be in violation of attorney ethics and the Judicial Canons. It is inconsistent and disconcerting to suggest that a lawyer who strives to promote the integrity of the profession and the judiciary is nevertheless characterized as having engaged in ethical misconduct.

As the Louisiana Disciplinary Board correctly stated as relates to this charge, "the respondent made no statements that he knew were false, nor did his statements contained in the assignment of error rise to the level of reckless disregard...considering the unanimous testimony of the Third Circuit judges that the assignment was neither unethical nor a violation of any rule of court, the Committee could not conclude that the respondent engaged in any conduct that was prejudicial to the administration of justice."

D. CLEAR AND CONVINCING BURDEN OF PROOF

Rule 19 of the Louisiana Supreme Court Rules provide that the burden of proof in disciplinary matters is by "clear and convincing" evidence. Rule 19 § 18 (C). Rule 19 § 18 (D) provides that the burden of proof is on disciplinary counsel. The clear and convincing standard requires greater certainty.[22] Apparently, however, the heightened burden of "clear and convincing" as relates to disciplinary matters is only applied in theory and not practice.

In speaking to "clear and convincing" evidence it has been held that the fact finder must have an abiding conviction that the truth of the factual contentions is highly probable.[23] The fact finder must have a firm belief or conviction as to the matter sought to be proved.[24] It has been held that "clear and convincing" evidence is such that there is no reasonable doubt in the mind of the trier of fact as to the truth of the proposition.[25]

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[22] *Chatelain vs. State, Dept. Of Transportation and Development*, 586 So. 2d. 1373, (La. 1991).

[23] *Succession of Young*, 692 So. 2d. 1149 (La. App. 3rd Cir. 1997); *Succession of Cole*, 618 So. 2d. 554 (La. App. 4th Cir. 1993); *LSBA vs. Edwins*, 329 So. 2d. 437 (La. 1976).

[24] *LSBA vs. Edwins, supra*

[25] *LSBA vs. Edwins, Supra; Chatelain vs. DOTD, Supra*

As previously noted, as relates to the majority of the charges, more "fact finders" involved in the disciplinary process found petitioner innocent of any violations and recommended that all charges be dismissed than did the number of "fact finders" that ultimately found misconduct. For example, as relates to the recusation motion, a total of eighteen "fact finders" reviewed the record and of the eighteen, thirteen found no misconduct. As relates to the "assignment of error" 12 of the 18 found no violation. And, as relates to the "hypothet" 8 of the 18 found no violation. Indeed, the Louisiana Supreme Court was even split as relates to this matter. One would expect that if the "clear and convincing" standard meant anything it would mean that there should be at least some measure of consensus among the "finders of fact".

The gravamen of the injustice is further exacerbated by the fact that the Hearing Committee found "identifiable evidence" justifying petitioner's efforts and the Louisiana Attorney Disciplinary Board ordered **all** charges be dismissed specifically finding that "the purpose of the hypothetical was to demonstrate respondent's frustration with the 'official capacity' defense used by Mr. Briney. . . He offered the hypothetical for one purpose, only to have the purpose disintegrate into an unintended result. . . His actions were not calculated to outrage but to persuade" and specifically noting that the record lacked evidence of "malice or ill will" and petitioner's motive was the "desire and duty to zealously represent his client". Even more illustrative of the injustice is the fact of one disciplinary board member's passionate and provocative declaration that it was "nonsense" to assert any violation by petitioner and that he ultimately was "more shocked at the judicial behavior evidenced in this case" and concurred that all charges be dismissed.

The sad result of the Louisiana Supreme Court's constitutional violations is that petitioner has incurred losses exceeding $100,000.00[26] in initially successfully defending against

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[26] Petitioner's malpractice insurer was set to reimburse petitioner his expenses upon the findings of the Disciplinary Board until the Louisiana Supreme Court reversed.

the charges only to be subjected to the Louisiana Supreme Court's apparent rejection of the "clear and convincing" standard of proof and the apparent rejection of the function of the Hearing Committee and Disciplinary Board and the abandonment of the "manifest error" standard of review.[27] Another sad consequence is that petitioner's professional record and reputation have been permanently blemished and the fact of discipline in this case is being utilized by opposing litigants as a litigation tool.

CONCLUSION

It is a sad day in American Jurisprudence when a lawyer cannot speak truthfully in a court of law for fear of discipline. Indeed, if a lawyer cannot speak truthfully in a court of law Freedom of Speech means nothing to the citizens on the street. This case has been the topic of discussions in many continuing legal education seminars and around the legal community in general. This case has and will continue to have a chilling effect on lawyers in Louisiana, and perhaps elsewhere. This Court has been required from time to time to intervene and teach in order to prevent Constitutional violations when Free Speech and Due Process is concerned. This case is one such example. It should be offensive to even the most conservative notions of Free Speech and Due Process that a lawyer can be the subject of discipline for truthful allegations or that a state Supreme Court can arbitrarily decide when to apply the "clear and convincing" burden of proof or can arbitrarily decide when to afford

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[27] To further exacerbate the injustice, although the Louisiana Supreme Court Rules provide that the Louisiana Code of Civil Procedure applies in disciplinary cases, petitioner's Exception of No Cause of Action and Motion for Summary Judgment were summarily denied on disciplinary counsels contention that nothing less than going the full gammit of the disciplinary process was allowed. Denying an attorney the opportunity for summary disposition is yet another denial of due process. To make an attorney pay the price to successfully defend the entire process only to change the rules and eviscerate the factual findings of the Hearing Committee and Disciplinary Board seems clearly inappropriate.

deference to the factual findings of the Hearing Committee and Disciplinary Board and when not to. United States Supreme Court Justice Frankfurter made it clear that courts are not immune from criticism and that lawyers have a "special responsibility to exercise **fearlessness** in doing so". More significantly, Justice Frankfurter assured all lawyers that as long as "this court still exercises judicial power these claims will be heard and heeded". It is respectfully submitted that this is one case deserving of this Honorable Court's intervention.

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BY: LESLIE J. SCHIFF
LESLIE J. SCHIFF -- BAR NO. 11776

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Petition has this day been forwarded by U.S Mail to Ms. Donna L. Robert, Louisiana Attorney Disciplinary Board, 2800 Veterans Memorial Blvd., Suite 310, Metairie, Louisiana 70002, and to Mr. Charles Plattsmier, Office of Disciplinary Counsel, 4000 S. Sherwood Forest Blvd., Suite 607, Baton Rouge, Louisiana postage prepaid and properly addressed.

Opelousas, Louisiana this 24TH day of February, 2006.

LESLIE J. SCHIFF
LESLIE J. SCHIFF

APPENDIX A

SUPREME COURT OPINION

SUPREME COURT OF LOUISIANA

NO. 04-B-2947

IN RE: J. CLEMILLE SIMON

ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM

The Office of Disciplinary Counsel ("ODC") filed formal charges against respondent, J. Clemille Simon, an attorney licensed to practice law in Louisiana. The disciplinary board recommended the formal charges be dismissed, and the ODC sought review of that decision in this court. o For the reasons assigned, we find the formal charges were proven by clear and convincing evidence and therefore impose discipline.

Johnston, J. disssents and would impose a longer period of actual suspension.

Caloger, C.J. concurs in part and dissents in part and assigns reasons.

Weimer, J. concurs in part and dissents in part and assigns reasons.

UNDERLYING FACTS

Count I

Respondent filed a personal injury suit in Vermilion Parish on behalf of Sandra and Joey Simon. The suit was randomly

allotted to Judge Edward Rubin of the *15th* Judicial District Court. Subsequently, respondent filed a motion to recuse Judge Rubin, asserting Judge Rubin was biased and prejudiced because he ruled against the plaintiffs in several pre-trial motions. Respondent alleged in his motion, among other things, that Judge Rubin "embarked upon a campaign of misrepresenting the truth" and "made intentional misrepresentations of fact, for the purpose of prejudicing" respondent and the plaintiffs.

Judge Rubin referred the motion to recuse to Judge John Trahan. Judge Trahan conducted a 5 ½ -hour evidentiary hearing on the motion, at which Judge Rubin was the only witness. At the conclusion of respondent's presentation, Judge Trahan denied the motion to recuse, finding it "groundless."

Count II

Respondent filed a personal injury suit in Lafayette Parish on behalf of Leslie Counselman. One of the defendants in the case, United Services Automobile Association, was represented by attorney Patrick Briney of the Lafayette law firm of Briney & Foret. The suit was randomly allotted to Judge Edward Rubin.

During the course of the litigation, respondent learned that the judges of the 15th JDC had previously retained Mr. Briney to represent the court in connection with a challenge to its misdemeanor probation program in a criminal case captioned *State V. Cavazos.* Based on this information, respondent filed a motion to disqualify Mr. Briney and his firm as attorneys of record in the Counselman case. The motion also sought the recusal of "all Judges of the 15th Judicial District Court from the instant matter." In support, respondent argued that an obvious appearance of impropriety existed as a result of the "intimate, personal and confidential attorney/client relationship" between the judges and Mr. Briney.

Judge Rubin denied respondent's motion without conducting a hearing, and the court of appeal denied respondent's application for supervisory writs. Respondent then applied to this court. We granted the writ in part and appointed retired Judge Anne Lennan Simon to conduct an evidentiary hearing on the motion. *Counselman v. Progressive Ins. Co.*, 01-2335 (La. 8/13/01), 794 So. 2d 837. After conducting a hearing, Judge Simon denied respondent's motion, finding that Mr. Briney was retained by the 15th JDC judges solely to represent the court in an official capacity, and that Mr. Briney had no other legal relationship with the judges.

Respondent then sought review of Judge Simon's ruling in the Court of Appeal, Third Circuit.[1] In his writ application, respondent included a four-page "Hypothetical Telephone Conversation Between Patrick J. Briney And His Clients (Judges of The 15th Judicial District Court)" in support of his argument that the "official capacity" defense was legally unsound.[2] The court of appeal refused to accept the writ application for filing and directed the clerk of court to return it to respondent, with instructions that he delete the "hypothetical" conversation. Respondent complied with the court's instructions but included the following footnote in the revised writ application:

> Plaintiff had previously attempted to set forth in the context of a hypothetical conversation a truthful portrayal of the absurd imagery of defense counsel's "official capacity" defense. By Order of this Court plaintiff is not at liberty to exercise her First Amendment freedom of speech nor engage in any such truthful debate. As such,

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[1] As previously noted, respondent had also sought to recuse the 15th JDC judges, which Judge Simon declined to do. In his writ application, respondent abandoned this issue and limited his argument to the portion of Judge Simon's judgment denying the motion to disqualify Mr. Briney.

[2] The text of the hypothetical telephone conversation is attached as an appendix to this opinion.

the hypothetical conversation has been deleted.

On the merits, the court of appeal denied respondent's application for supervisory writs, as did this court. *Counselman v. Progressive Ins. Co.*, 02-0474 (La. 3/8/02), 811 So. 2d 879. The clerk of the court of appeal forwarded copies of respondent's original writ application and revised application to the ODC.

Count III

In the writ application subject of Count II, respondent raised as error Judge Simon's denial of his motion to disqualify Mr. Briney, stating at page iii of the application:

> Judge Simon (Judge *Ad Hoc)* has committed reversible error in the performance of her duties as Judge *Ad Hoc.* Specifically, Judge Simon utilized the wrong standard (subjective) in deciding this issue. **In denying plaintiff's Motion to Disqualify/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system** is **based.** Judge Simon's denial undermines the efficacy of our jurisprudence, attorney ethics and judicial canons and serves no other purpose but to promote public disrepute and distrust of our legal system. Indeed, Judge Simon's denial of plaintiff?'s motion is baseless and legally, logically and ethically unsound. [emphasis added]

The ODC alleges that in using the highlighted language, respondent personally attacked Judge Simon's integrity without any reasonable factual basis for doing so.

DISCIPLINARY ROCEEDINGS

After investigation, the ODC filed three counts of formal charges against respondent. The charges are as follows:

COUNT I

You represented Joey and Sandra Simon, plaintiffs in a personal injury lawsuit that you filed in Vermilion Parish, which was assigned to Judge Edward Rubin of the 15th JDC. After Judge Rubin ruled against you in several pretrial motions, you brought a Motion to Recuse seeking to remove Judge Rubin from the case and personally attacked his judicial integrity without any reasonable factual basis for doing so.

Again, without any factual basis for doing so, you improperly accused Judge Rubin of "embarking upon a campaign of misrepresenting the truth," further asserting that he had "made intentional misrepresentations of fact, for the purpose of prejudicing (you) and (your clients)." Your conduct violates Rule 8.2(a).

In support of your motion to recuse, you cited substantive rulings Judge Rubin made which you contend were improper and without legal support, yet Judge Rubin was affirmed by the appellate court on virtually all substantive issues raised by your writ applications. In the hearing on the motion to recuse, you were unable to produce any identifiable evidence of Judge Rubin's bias or personal animus against you or your client, despite your claims that such evidence existed. Another judge appointed to hear the recusal motion denied same immediately after the hearing was concluded. Your conduct violates Rules 3 . 1 and 3 .3 of the Rules of Professional Conduct.

Your actions in bringing a groundless and frivolous motion to recuse Judge Rubin caused delay in the prosecution of

your clients. case and diverted the court's attention from other, substantial court business. Your conduct violates Rule 8 .4(d) of the Rules of Professional Conduct.

COUNT II

In another personal injury case *(Counselman v. Progressive Insurance Co.)* you brought yet another motion to recuse the entire 5th Judicial District Court from hearing any cases where Patrick Briney or his firm was representing the opposing party. After the *ad hoc* judge appointed to hear your motion denied same after a hearing, you filed a writ application with the 3rd Circuit Court of Appeals. In that application, you created a wholly fictitious telephone conversation, which you allege accurately represented verbal communications between your opposing counsel and the judges of the 15th JDC. The judges and opposing counsel are depicted in that conversation as conspiring to deprive both you and your client of substantive rights and to subvert the justice system.

Upon reviewing the contents of that fictitious telephone conversation, the Judges of the Third Circuit Court of Appeals refused to accept your writ application for filing and instructed the clerk to return it to you, with instructions to remove the "hypothetical" conversation. The Court also found your brief to be "replete with insulting, abusive, discourteous and irrelevant matter" in violation of Rule 2-12.4 of the Uniform Rules of the Court of Appeal.

Although you removed the offending conversation from the brief, you nonetheless continued to insist that your depiction represented a "truthful portrayal" of communications you alleged occurred among Mr. Briney and the judges of the 15th JDC, despite the fact that there is no evidence that any conversation such as you described ever took place. Your conduct violates Rules 3 . 1 , 3 .3 and 8.2(a) of the Rules of Professional Conduct.

COUNT III

Judge Anne Lennan Simon was appointed *ad hoc* by the Louisiana Supreme Court to hear your recusal motion brought against the judges of the 15th JDC. After a full hearing, Judge Simon dismissed your motion and assigned written reasons. In appealing her decision, you wrote in your writ application to the Third Circuit Court of Appeals that Judge Simon "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is o based." Your conduct violates Rule 8.2(a) and 8.4(d) of the Rules of Professional Conduct.

Respondent answered the formal charges and denied any misconduct. The matter then proceeded to a formal hearing, at which time the ODC and respondent introduced volumes of documentary evidence and presented the testimony of numerous witnesses.

Hearing Committee Recommendation

As to Count I, the hearing committee concluded the ODC failed to prove by clear and convincing evidence that the motion to recuse was frivolous. Notwithstanding that respondent did not win the motion, the committee found there is insufficient evidence to support the ODC's allegation that the motion had no basis in law or fact. In this regard the committee was particularly impressed that Judge Rubin did not deny the motion outright but chose to refer it to another judge for hearing. Next, the committee concluded the ODC failed to prove by clear and convincing evidence that respondent made false statements in the motion to recuse. The committee pointed out that respondent believed at all times that the motion had merit. Moreover, the committee found the evidence presented at the hearing proved that respondent's clients could reasonably have believed that Judge Rubin's rulings — some of which were overturned by the Third Circuit — necessitated the motion to recuse. Third, the committee found the

ODC failed to prove by clear and convincing evidence that the motion to recuse, taken as a whole, contains improper allegations as to Judge Rubin. Finally, the committee found the ODC failed to prove by clear and convincing evidence that the filing of the motion to recuse was prejudicial to respondent's clients or to the administration of justice. Accordingly, the hearing committee recommended Count I be dismissed.

Turning to Count II, the committee concluded that in his writ application filed with the Third Circuit, respondent made false statements about the 15th JDC judges and made statements with reckless disregard concerning the integrity of certain judges in the 15th JDC. Such conduct violated Rules 3.3 and 8.2(a) of the Rules of Professional Conduct. However, the committee concluded the ODC failed to prove by clear and convincing evidence that respondent violated Rule 3.1 by including the hypothetical telephone conversation in the writ application. The committee found respondent was clearly arguing for modification or reversal of the law in his writ application, and pointed out that nearly every Third Circuit judge identified merit in respondent's argument criticizing the "official capacity" defense offered by Mr. Briney.

Finally, as to Count III, the committee concluded the ODC failed to prove by clear and convincing evidence that respondent knowingly made false statements, or that his statements contained in the assignment of error rose to the level of reckless disregard concerning the integrity of Judge Simon. The committee also concluded the ODC failed to prove by clear and convincing evidence that respondent's conduct was prejudicial to the administration of justice, given the unanimous testimony of the Third Circuit judges that the assignment of error was neither unethical nor a violation of any court rule. Therefore, the committee recommended Count III be dismissed.

Turning to the issue of an appropriate sanction for

respondent's misconduct in Count II, the committee found respondent violated duties owed to the judiciary and the legal system. There was no evidence of harm to respondent's client, but the potential for harm existed in that the hypothetical telephone conversation potentially lessened the public's trust and confidence in the judiciary. The unnecessary reference to certain judges in a negative context was reckless and offensive, and caused harm to the judges depicted. The committee found that respondent knew certain statements contained in the colloquy were false, but that he did not knowingly or intentionally mislead the court because he labeled the conversation as hypothetical. The committee determined that the baseline sanction for respondent's misconduct is a reprimand.

As aggravating factors, the committee acknowledged respondent's prior disciplinary offenses[3] and substantial experience in the practice of law. (admitted 1990). In mitigation, the committee recognized the absence of a dishonest or selfish motive and full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings.

The committee noted that suspensions were imposed in both *Louisiana State Bar Ass' n v. Karst,* 428 So. 2d 406 (La. 1983) (one-year suspension), and *In re: Larvadain,* 95-2090 (La. 12/8/95), 664 So. 2d 395 (three-month suspension, deferred subject to probation), for misconduct similar to that at issue in this case. However, the committee believed those cases involved more egregious conduct than respondent's,[4] and instead found cases

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[3] In May 2000, respondent was admonished by the disciplinary board for his violation of Rule 1.7 of the Rules of Professional Conduct (engaging in a prohibited conflict of interest by representing adverse parties in contemporaneous litigation).

[4] Karst accused a judge of being "dishonest, corrupt and engaging in fraud and misconduct," and caused his unfounded accusations to be disseminated throughout the community. Larvadain accused a judge of being a racist while cursing him, threatening him, and attempting to intimidate him.

from other jurisdictions to be more persuasive. *See In re Wilkins,* 782 N.E.2d 985 (md. 2003) (on rehearing) (brief signed by attorney included a footnote stating that the opinion of the appellate court was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)"; public reprimand imposed); *Kentucky Bar Ass 'n v. Heleringer,* 602 S.W.2d 165 (Ky. 1980) (attorney claimed in a press conference that the trial judge acted in a manner that was "highly unethical and grossly unfair"; public reprimand imposed).

Considering all the circumstances, the committee recommended that respondent be publicly reprimanded for his conduct in Count II which impugned the integrity of the judges of the 15th JDC. The committee further recommended that respondent be ordered to attend four hours of professionalism classes for each of the next three years, failing which he should be suspended.

Both respondent and the ODC filed objections to the hearing committee's report and recommendation.

Ruling of the Disciplinary Board

As to Count I, the disciplinary board agreed with the hearing committee's finding that the ODC did not prove by clear and convincing evidence that respondent violated Rules 3.1, 3.3, 8.2(a), and 8.4(d). Based upon the court of appeal's reversal of several of Judge Rubin's rulings in the Simon case, respondent "demonstrated tangible reasons for his belief that a motion to recuse Judge Rubin was warranted." The board further noted that respondent's clients were consulted about whether to bring the motion to recuse and supported it.

In Count II, the board accepted the committee's finding that the ODC did not prove respondent violated Rule 3.1 by raising frivolous claims in the court of appeal. In support, the board observed that several of the court of appeal judges who testified at the hearing indicated respondent presented a legitimate issue of "judicial independence in light of an attorney-client relationship"; but for respondent's decision to abandon his argument with respect to the recusal of all the 15th JDC judges, he may have obtained the result that he sought.

The board rejected the committee's finding that respondent violated Rule 3.3 by failing to act with candor toward a tribunal. According to the board, respondent did not knowingly or otherwise misrepresent a material fact because the hypothetical, which is clearly identified as such, is not a fact nor is it material to the issue presented to the court of appeal.

The board agreed, however, that the hypothetical may have impugned the integrity of the judges of the 15th JDC, and to that extent, respondent has technically violated Rule 8.2(a). The board noted that respondent's "use of real names, identifiable hobbies and interests and actual cases shifted the focus from hypothetical to real people." Nonetheless, the board found respondent's hypothetical was not intended to impugn the integrity of the judges but to defeat the "official capacity" defense.[5]

Considering the case as a whole, the board found respondent's actions did not warrant discipline. However, the board cautioned respondent that his conduct "falls well short of the goals of professionalism" and that he "would be well served

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[5] The board did not specifically discuss Count III, but apparently accepted the committee's determination that the ODC failed to prove the charged misconduct.

to abstain from such conduct in the future." Two board members dissented and would recommend that respondent be sanctioned.

The ODC sought review of the board's ruling in this court. We ordered the parties to submit briefs addressing the issue of whether the record supports the disciplinary board's report. After reviewing the briefs filed by both parties, we docketed the matter for oral argument.

DISCUSSION

Bar disciplinary matters fall under the original jurisdiction of this court. La. Const. art. V, § 5(B). We act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Quaid,* 94-1316 (La. 11/30/94), 646 So. 2d 343; *Louisiana State Bar Ass'n v. Boutall, 597* So. 2d 444 (La. 1992).

The primary allegation made by the ODC in all three counts of the formal charges is that respondent's conduct violated Rule 8.2(a) of the Rules of Professional Conduct.[6] That rule provides in pertinent part as follows:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

Because this rule proscribes only statements which the lawyer knows to be false or which the lawyer makes with reckless disregard for the truth, it comports with the First

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[6] Although the ODC alleged other rule violations, it is clear these violations are largely ancillary to the Rule 8.2(a) violations. Accordingly, this opinion focuses on Rule 8.2(a), which is the "heartland" of respondent's misconduct. See *In re: Rome,* 01-2942 (La. 9/26/03), *856* So. 2d 1167.

Amendment's guarantee of free speech.[7] See *Garrison v. Louisiana,* 379 U.S. 64 (1964). In *Louisiana State Bar Ass'n v. Karst,* 428 So. 2d 406 (La. 1983), we interpreted DR 8-102(B), the predecessor of Rule 8.2(a). We adopted an objective standard, rather than a subjective standard, in analyzing whether a statement is knowingly or recklessly false and hence a violation of the rule:

> In our opinion, DR 8-102(B) is violated when an attorney intentionally causes accusations to be published which he knows to be false, or which, with the exercise of ordinary care, he should know to be false.

The rationale for DR 8-102(B) appears in Ethical Consideration 8-6, the pertinent part of which provides:

> Adjudicatory officials, not being wholly freed to defend themselves, are entitled to receive the support of the Bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

This provision clearly illustrates that it is not the genuineness of an attorney's belief in the truth of his allegations, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the

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[7] Reading Rule 8.2(a) literally, it is possible to argue that it prohibits making a statement with reckless disregard for its truth or falsity, even if it is true. Most commentators have rejected this view. Geoffrey C. Hazard, Jr. and W. William Hodes, 2 THE LAW OF LAWYERING § 63.2 n. 4 (3d ed. 2003); Charles W. Wolfram, MODERN LEGAL ETHICS § 11 .3.2 n. 5 1, 54 (1986).

meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR 8-102(B).

Following these precepts, we now turn to an examination of respondent's assertions against the various judges in this case to determine whether, under an objective standard, a reasonable attorney would believe in the truth of the allegations.

Count I

In his motion to recuse Judge Rubin in the Simon case, respondent alleged that Judge Rubin "embarked upon a campaign of misrepresenting the truth" and "made intentional misrepresentations of fact, for the purpose of prejudicing" respondent and the plaintiffs. Respondent asserts these allegations were reasonable because the record reveals a pattern of unfavorable pre-trial rulings against his clients, several of which were reversed upon appellate review. Respondent further contends that Judge Rubin admitted to improper actions in this case. According to respondent, Judge Rubin initially represented that he had a telephone conference with both attorneys in the case regarding the setting of defendants' motions, but later conceded during the disciplinary hearing that he did not conduct this telephone conference.

We do not believe these facts would cause a reasonable person to believe that Judge Rubin "embarked upon a campaign of misrepresenting the truth." The mere fact that Judge Rubin may have committed legal error in some of his pre-trial rulings does not lead to the inevitable conclusion that his rulings stemmed from an improper motive against respondent or his client. See *In re Sawyer*, 360 U.S. 622, 635 (1959) ("Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions."). Likewise,

Judge Rubin's erroneous statement that he held a telephone conference with both attorneys does not provide evidence that Judge Rubin made "intentional misrepresentations of fact." Instead, this appears to be a simple mistaken recollection by Judge Rubin, which is understandable when considering the large number of cases handled by a trial judge.[8]

Considering the record as a whole, we find nothing in Judge Rubin's actions which would cause a reasonable person to believe that he "embarked upon a campaign of misrepresenting the truth" and "made intentional misrepresentations of fact, for the purpose of prejudicing" respondent and the plaintiffs. Therefore, we must conclude respondent's statements were knowingly false.

Count II

The allegations of Count II revolve around respondent's inclusion of a "hypothetical" telephone conversation in his writ application in the Counselman case. Respondent asserts this hypothetical conversation was designed to illustrate the fallacy of the "official capacity" defense advanced by opposing counsel in support of the argument that disqualification was not warranted. Because the conversation was labeled "hypothetical," respondent contends it was not intended to be a true statement; rather, it was the "antithesis of factual."

Despite respondent's labeling of the conversation as "hypothetical," the conversation uses the real names of judges and attorneys and makes reference to these persons' identifiable hobbies and interests, as well as actual pending cases. While we agree respondent did not represent that this conversation actually took place, he clearly intended to convey that the judges referenced in the conversation were engaged in improper conduct.

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[8] During respondent's disciplinary hearing, Judge Rubin explained that at his direction, the telephone conference was conducted by his office staff.

These depictions were not essential to the arguments raised in the writ application; respondent was perfectly capable of arguing against the "official capacity" defense without resorting to insults and disrespect for the judiciary.

We would eviscerate Rule 8.2(a) if we were to shield an attorney from discipline for making knowingly false statements about judges simply because he used the artifice of a "hypothetical." Under the facts of this case, we must conclude respondent violated Rule 8.2(a).

Count III

In this count, the ODC alleges respondent falsely impugned the honesty of Judge Simon when he asserted that her denial of the motion to disqualify "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based." In his brief to this court, respondent defends his allegations against Judge Simon, which he asserts represent an "accurate assessment" of her ruling.

In *In re Sawyer*, 360 U.S. at 635, the United States Supreme Court explained that the "public attribution of honest error to the judiciary is no cause for professional discipline in this country." Nonetheless, respondent's allegations against Judge Simon go beyond charges of"honest error." To the contrary, respondent asserts that Judge Simon's ruling violates principles of "honesty and fundamental fairness."

Our review of Judge Simon's November 12, 2001 ruling denying respondent's motion to disqualify finds it is well grounded in the law and precedents established by this court. Nothing in that ruling supports the view that Judge Simon acted dishonestly or that she violated principles of fundamental fairness in denying the motion.

Therefore, considering the facts from an objective standpoint, we find it was not reasonable for respondent to allege Judge Simon's ruling violates principles of "honesty and fundamental fairness." We must conclude respondent made this vitriolic statement with full knowledge of its falsity.

DISCIPLINE

Having found evidence of professional misconduct, we now turn to a discussion of the appropriate discipline to be imposed. In considering that issue, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So. 2d 1173 (La. 1 987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington, 459* So. 2d 520 (La. 1984).

In *Karst,* 428 So. 2d at 41 1, we observed that a violation of Rule 8.2(a) (then DR 8-102(B)) "constitutes a serious breach of professional conduct, justifying a substantial punishment to avoid deprecation of the offense and to provide a meaningful deterrent to other potential offenders." In imposing an actual period of suspension in that case, we found it significant that the lawyer "exhibited no remorse or retraction of his spurious and unfounded allegations" against the trial judge.

In the same way, we find respondent in the instant case has consistently refused to acknowledge the wrongful nature of his conduct, and has failed to demonstrate remorse for his actions. Other aggravating factors present in this case include respondent's prior disciplinary record and his substantial experience in the practice of law. In mitigation, we recognize the absence of a dishonest or selfish motive and respondent' cooperative attitude

toward these proceedings.

Considering the record as a whole, we conclude the appropriate sanction for respondent's misconduct is a suspension from the practice of law for a period of six months. However, we will defer all but thirty days of this suspension on the condition that respondent successfully complete the Louisiana State Bar Association's Ethics School program. We urge respondent to take this opportunity to reflect upon his professional and ethical duties as a member of the bar of this state, in particular the need to balance the zealous advocacy of a client's cause with his oath as an attorney to "maintain the respect due to courts and judicial officers." In fashioning the sanction in this manner, we caution respondent that we will not tolerate any future misconduct of the type seen here.

DECREE

Upon review of the findings and recommendation of the hearing committee and the disciplinary board, and considering the record, briefs, and oral argument, it is ordered that J. Clemille Simon, Louisiana Bar Roll number *19996,* be and he hereby is suspended from the practice of law for a period of six months. It is further ordered that all but thirty days of this suspension shall be deferred, subject to the condition that respondent shall enroll in and attend the next session of the Ethics School program offered by the Louisiana State Bar Association's Practice Assistance and Improvement Committee. Failure to comply with this condition or any other misconduct within a period of one year from the finality of this opinion may be grounds for making the deferred portion of the suspension executory, or imposing additional discipline, as appropriate. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 1 0. 1, with legal interest to commence thirty days from the date of finality of this court?'s judgment until paid.

Appendix

Hypothetical Telephone Conversation Between Patrick J. Briney and His Clients (Judges of The 15th Judicial District Court)

Patrick Briney:	Ring. . .ring. . .ring...
Judge Everett:	Hello?
Patrick Briney:	Glen?
Judge Everett:	Yes...
Patrick Briney:	Hi Glen, this is Pat. . .how are you my good friend?
Judge Everett:	Hey Pat. . .I'm doing fine. . .how are you?
Patrick Briney:	I can't complain. . .although I"m having to work more than I'd like especially since Simon is trying to disqualify me.
Judge Everett:	Yeah, that's an interesting situation. I'm told Ed dismissed the motion without even allowing a hearing.
Patrick Briney:	Yeah. . .we made Simon take writs to the Supreme Court. . .Of course, they reversed and remanded.
Judge Everett:	So I heard.
Patrick Briney:	Yeah. . .lucky for us they appointed Judge Anne Simon. . . she's made short shrift of Simon's motion. . .thank God she reversed her previous discovery ruling and didn't allow Simon to take my deposition. . .1 think I dodged a bullet there...
Judge Everett:	Yeah, what's Simon going to do now?
Patrick Briney:	Oh, if history is any indication, he'll take writs.We should be alright since Judge Simon denied Simon's motion and

	I did not have todisclose all of the details of our relationship.
Judge Everett:	Well, Pat what can I do for you today?
Patrick Briney:	I was calling about the situation in *State v.Cavazos*. . . are you wearing your official black judicial robe?
Judge Everett:	Hold on. . .it's hanging right here. . .let me put it on...
Patrick Briney:	That would be a good idea...(pause)
Judge Everett:	Pat?
Patrick Briney:	Yeah, Glen...
Judge Everett:	Ok...I've got my official black judicial robe on.
Patrick Briney:	Great, now we can talk about *State v. Cavazos* because, as you know, I only represent you all in your "official capacity." What are we going to do if the Supreme Court grants Attorney Block's writ?
Judge Everett:	Hell. . .I don't know. . . we probably should get Judge Edwards on the phone since he has taken my place as chief judge.
Patrick Briney:	Good idea. . .I happen to have his personal cell phone number righ there, I'll try to conference him now. (pause)
Judge Edwards:	Hello?
Patrick Briney:	Jules. . .it's Pat. . .I've got Glen on the line.
Judge Edwards:	Hey Pat. . .hey Glen. . .what's up?
Patrick Briney:	I had called Glen to talk about *State v. Cavazos*.
Judge Everett:	And I figured since you were now chief judge that we should get you on the phone.

Patrick Briney:	You have your official black judicial robehandy?
Judge Edwards :	I'm actually at the National Guard headquarters and don't have my official black judicial robe.
Patrick Briney:	Well. . .you probably should not participate because, as you know, I only represent you all in your "official capacity."
Judge Everett: .	Fortunately, Pat caught me at my office and I have my robe on.
Patrick Briney:	Well, Jules. . . with your permission we'll continue to discuss *State v. Cavazos* without you. I'll give you a call later. Will you have your robe and shall I call you at home or on your cell phone?
Judge Edwards:	I'll be home and yes I'll have my robe so we can talk then.
Patrick Briney:	Great, we'll talk then. Bye Jules.
Judge Edwards:	Bye Pat. . . bye Glen.
Judge Everett:	Bye Jules.
Patrick Briney:	Well, what next?
Judge Everett:	Let's try to get Ed on the phone.
Patrick Briney:	Good idea, I happen to also have his private cell phone number. Chances are, however, he'll be on the tennis courts and won't have his official black judicial robe handy.
Judge Everett:	He sure does love that tennis!
Judge Rubin:	Hello?
Patrick Briney:	Ed, hello this is Pat, I've got Glen on the line.
Judge Rubin:	Hey Pat, hey Glen. . . how you all doing?
Patrick Briney:	Great.

Judge Everett	Working as usual what are you doing, playing tennis?
Judge Rubin:	Of course, I've got to practice. . . Chanda is coming home next week and I know she'll want to play. By the way Glen, do you think you can cover my cases so that I can play tennis with Chanda next week?
Judge Everett	Not a problem, next week is my office week.
Judge Rubin:	Great. So what's up?
Patrick Briney:	I was calling to talk about *State v. Cavazos*.
Judge Rubin	Is that the case where Simon is raising hell and trying to disqualify you?
Patrick Briney	Not exactly Simon is trying to disqualify me in that civil case pending before you. Remember, you denied his motion without a hearing?
Judge Rubin:	Oh yeah. . . *State v. Cavazos* is the one where Block is causing trouble.
Patrick Briney	That's right wouldn't it be nice if Simon and Block would just do like most others and let us do what we please?
Judge Rubin	Are you kidding? Simon is Minos' son and Block used to work for Minos.
Patrick Bnney	I guess it's true what they say the acorn doesn't fall far from the tree. Heaven help us.
Judge Rubin:	Well, if we are going to talk about *State v. Cavazos* I'll have to get my official black judicial robe out of my Mercedes and put it on . . . hold on a minute. (pause)
Judge Rubin:	Ok. . . . let"s talk.

Patrick Briney:	Shouldn't we also get Tommy on the phone since he was primarily responsible for establishing the misdemeanor department and in hiring me and my firm?
Judge Everett:	Perhaps.
Judge Rubin:	Yeah.
Patrick Briney:	Good thing I also have his private cell phone number, I'll bet he's fishing or hunting with my partner. My how those two love to hunt and fish.
Judge Rubin:	Almost as much as I love to play tennis, ha. . .ha. . . ha. (pause)
Judge Duplanter:	Hello?
Patrick Briney:	Tommy, Pat here, I've got Glen and Ed on the phone. . .what are you doing my good friend?
Judge Duplantier	Trying to teach your partner how to fish might I add he's not learning very well.
Patrick Briney:	Hell, he never works because he's either fishing or hunting, he should be a pro by now.
Judge Rubin:	Where are you two fishing?
Judge Duplantier:	In the Gulf, I'm surprised that you were able to reach me.
Judge Everett:	Pat said you would be fishing. . .he knows you pretty well.
Judge Duplantier:	Almost as well as his partner I'd expect. So what's up?
Judge Everett:	Pat was calling to talk about *State v. Cavazos*.
Patrick Briney:	Did you happen to bring your robe fishing with you Tommy?
Judge Duplantier:	No, I left it hanging in my office when I left Wednesday to come fishing.

Patrick Briney	Well, since I've taken the position with Simon that I only represent you all in an "official capacity" it's probably best that we not talk without you wearing your robe, after all, when I testified, I took an oath.
Judge Rubin:	Ok then, I guess I can get back to my tennis game?
Foret (Briney's Partner):	I've got a big one get the gaff Tommy!
Judge Duplantier:	Gotta go guys. . . Charlie has finally caught a fish.
Patrick Briney:	Ok. Tell you what. . . how about we all get together at Ruth's Chris Steakhouse Sunday night. I'll reserve a private room. My treat! . You all bring your robes. . . we'll eat dinner and then iscuss what we will do next in *State v. Cavazos*.
Judge Everett:	See you all then. Bye bye.
Judge Rubin:	Can I bring Chanda?
Patrick Briney:	Certainly, I want an autograph.
Judge Rubin:	You got it. . . see you Sunday.
Judge Duplantier:	Adios.

SUPREME COURT OF LOUISIANA
No. 2004-B-2947

IN RE: J. CLEMILLE SIMON
ATTORNEY DISCIPLINARY PROCEEDINGS

CALOGERO, Chief Justice, concurs in part and dissents in part.

I differ with the majority as does my brother Justice Weimer regarding the appropriate sanction for respondent's conduct. I, too, would simply impose a public reprimand.

SUPREME COURT OF LOUISIANA
NO. 04-B-2947
IN RE: J. CLEMILLE SIMON

ATTORNEYDISCIPLINARYPROCEEDINGS

WEIMER, J., concurring in part and dissenting in part.

I agree with the conclusions of the hearing committee and disciplinary board regarding Count I and thus would not impose discipline on that count. I also agree with the conclusions of the disciplinary board regarding Count II. I agree with the majority that respondent violated Count III. I would impose a public reprimand as recommended by the hearing committee. I also agree with the disciplinary board that respondent's conduct, although in some instances not unethical, "falls well short of the goals of professionalism." The line between aggressive advocacy and unprofessional conduct was crossed by the respondent.

APPENDIX B

DISCIPLINARY BOARD OPINION

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE J. CLEMILLE SIMON
NUMBER 02-DB-029
RULING OF THE LOUISIANA DISCIPLINARY BOARD

This is a disciplinary proceeding based upon formal charges filed by the Office of Disciplinary Counsel ("ODC") against J. Clemille Simon ("Respondent") of Lafayette, Louisiana. This matter came before the Board on three counts of misconduct. Count I involved Respondent's failed efforts to recuse Judge Rubin for alleged bias against Respondent and his client, Sandra Simon. Count II resulted from Respondent's inclusion of a hypothetical phone conversation in a writ application.[1] Count III stems from Respondent's characterization of Judge Simon's reasons denying Respondent's motion to recuse the same opponent in Count II or, in the alternative, to recuse all the Judges of the Fifteen Judicial District Court. Counts II and III arise from Respondent's representation of Leslie Counselman.

The Board does not find any violations regarding Counts I and III and affirms the hearing committee's findings. With regard to Count II, the Board does not find a violation of Rules 3.1 or 3.3. While the Board finds that Rule 8.2(a) was technically violated by Respondent's characterization of certain Judges in a hypothetical submitted to the Third Circuit Court of Appeal, his conduct does not rise to the level of a sanction. The Board finds Respondent's conduct regarding the hypothetical imprudent and

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[1] The hypothetical conversation between Respondent's opponent, Patrick Briney, and several of the Fifteenth Judicial District Judges is contained in Addendum "A" attached hereto.

unprofessional. The Board orders the formal charges be dismissed.

PROCEDURAL HISTORY

On March 8, 2002, ODC filed formal charges against Respondent. On April 26, 2002, Respondent answered the charges and denied the same. After multiple continuances were requested by the parties, a hearing was scheduled for May 12 and 13, 2003. The parties filed pre-hearing memoranda. Respondent recommended the charges be dismissed and ODC urged an actual suspension of not less than a year and a day. On April 4, 2003, Respondent filed a Motion for Summary Judgment and Exception of No Cause of Action. ODC opposed the motion and exception on the grounds that Rule XIX does not permit a hearing committee to dismiss formal charges on summary proceedings. On April 11, 2003, David P. Bruchhaus, Chair of Hearing Committee #7, determined the hearing committee did not have authority to decide a motion for summary judgment after formal charges had been filed and deferred the motion to the merits of the case. The Louisiana Supreme Court denied Respondent's writ of mandamus regarding the motion for summary judgment.

A hearing on the merits was held on May 12 and 13, 2003, before Hearing Committee #7 (herein "Committee") but was not concluded. A third day of hearings was scheduled for November 18, 2003. On May 30, 2003, Respondent filed a Motion for Involuntary Dismissal based upon his prior motion for summary judgment and exception of no cause of action. ODC opposed the motion on the grounds that the Committee was only authorized to make a recommendation to the Disciplinary Board and lacked the authority to dismiss the formal charges. On November 18, 2003, the Committee Chair denied Respondent's motion and the hearing was continued to completion. H.C. Trans. (11/18/03) p.9.

After reviewing the parties? post-trial briefs, the Committee recommended dismissal of Counts I and III on March

10, 2004. As to Count II, the Committee found the hypothetical telephone conversation used in the writ application to be a violation of the Rules of Professional Conduct and recommended a public reprimand. Respondent objected to the Committee's finding of a violation based upon his use of a hypothetical to demonstrate his belief in the "absurdity" of the "official capacity" defense argued by his opponent, Patrick Briney. ODC objected to the Committee's failure to find a Rule violation based upon Counts I and III and continued to urge suspension of a year and a day, without deferral, and the completion of Ethics School.

Panel "B" heard this matter on May 27, 2004.

FORMAL CHARGES[2]

COUNT I

You represented Joey and Sandra Simon, plaintiffs in a personal injury lawsuit that you filed in Vermilion Parish, which was assigned to Judge Edward Rubin of the 15th JDC. After Judge Rubin ruled against you in several pre-trial motions, you brought a Motion to Recuse seeking to remove Judge Rubin from the case and personally attacked his judicial integrity without any reasonable factual basis for doing so.

Again, without any factual basis for doing so, you improperly accused Judge Rubin of "embarking upon a campaign of misrepresenting the truth," further asserting that he had "made intentional misrepresentations of fact, for the purpose of prejudicing (you) and (your clients)." Your conduct violates Rule 8.2 (a).[3]

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[2] Formal Charges, March 8, 2002.

[3] State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 8.2, LSA-R.S. foll. 37:221 Rule 8.2. Judicial and legal officials-(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or

In support of your motion to recuse, you cited substantive rulings Judge Rubin made which you contend were improper and without legal support, yet Judge Rubin was affirmed by the appellate court on virtually all substantive issues raised by your writ applications. In the hearing on the motion to recuse, you were unable to produce any identifiable evidence of Judge Rubin's bias or personal animus against you or your client, despite your claims that such evidence existed. Another judge appointed to hear the recusal motion denied same immediately after the hearing was concluded that your clients' case and diverted the court's attention from other, substantial court business. Your conduct violates Rule 8.4(d)[4] of the Rules of Professional Conduct.

COUNT II

In another personal injury case *(Counselman v. Progressive Insurance Co.)* you brought yet another motion to recuse the entire 1 o Judicial District Court from hearing any cases where Patrick Briney or his firm was representing the opposing party. After the *ad hoc* judge appointed to hear your motion denied same after a hearing, you filed a writ application with the 3rd Circuit Court of Appeals. In that application, you created a wholly fictitious telephone conversation, which you allege accurately represented verbal communications between your opposing counsel and the judges of the 15th JDC. The judges and opposing counsel are depicted in that conversation as conspiring to deprive both you and your client of substantive rights and to subvert the justice system.

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appointment to judicial or legal office.

[4] State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 8.4, LSA-R.S. foll. 37:221 Rule 8.4. Misconduct It is professional misconduct for a lawyer to:

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(d) Engage in conduct that is prejudicial to the administration of justice;

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Upon reviewing the contents of that fictitious telephone conversation, the Judges of the Third Circuit Court of Appeals refused to accept your writ application for filing and instructed the clerk to return it to you, with instructions to remove the "hypothetical" conversation. The Court also found your brief to be "replete with insulting, abusive, discourteous and irrelevant matter" in violation of Rule 2-12.4 of the Uniform Rules of the Court of Appeal.[5]

Although you removed the offending conversation from the brief, you nonetheless continued to insist that your depiction represented a "truthful portrayal" of communications you alleged occurred among Mr. Briney and the judges of the 15th JDC, despite the fact that there is no evidence that any conversation such as you described ever took place. Your conduct violates Rules 3.1, 3.3 and 8.2(a) of the Rules of Professional Conduct.

COUNT III

Judge Anne Lennon Simon was appointed *ad hoc* by the Louisiana Supreme Court to hear your recusal motion brought against the judges of the 1 5th JDC. After a full hearing, Judge Simon dismissed your motion and assigned written reasons. In appealing her decision, you wrote in your writ application to the Third Circuit Court of Appeals that Judge Simon "violated not only controlling legal authority but the very principals *(sic)* (honesty and fundamental fairness) upon which our judicial

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[5] Uniform Rules, Courts of Appeal, Rule 2-12.4, 8 LSA-R.S.

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The language used in the brief shall be courteous, free from vile, obscene, obnoxious, or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution. Any violation of this Rule shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned.

system is based." Your conduct violates Rule 8.2(a) and 8.4 (d) of the Rules of Professional Conduct.

FINDINGS OF THE HEARING COMMITTEE

During three days of hearings, the Committee heard the testimony of Judges Peters, Thibodeaux, DeCuir,[6] and Cooks of the Third Circuit Court of Appeal; Judges Rubin, Trahan,[7] Duplantier, Everett and Edwards of the Fifteenth Judicial District Court; Judge Anne Lennon Simon[8] (by video taped deposition); Kenneth DeBlanc (Clerk of Court — Third Circuit Court of Appeal); Michael Corry and Patrick Briney (both of the law firm of Briney & Foret and opposing counsel in matters giving rise to all three Counts); Respondent, and four other witnesses. The parties submitted voluminous amounts of exhibits and a portion of Judge Thibodeaux's testimony was proferred under seal.

Count I Findings of Fact (Respondent's representation of Sandra Simon):

1. Judge Rubin set three of the Defendant's Motion's to be heard without proper notice or sufficient time for the Plaintiff to Respond. The Motion's were filed, set, heard, and ruled on while the Respondent was out of the country. The Motions and Notice of Hearing were served one

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[6] Judges Peters, Thibodeaux and DeCuir considered Respondent's writ seeking to recuse the Fifteenth Judicial District Judges and the law firm of Briney & Foret in the matter of *Leslie Williams Counselman v. Progressive Insurance Co, et al,* Docket No. *00-5554-D,* 15th Judicial District Court, Lafayette Parish.

[7] Judge Trahan heard Respondent's motion to recuse Judge Rubin in *Sandra Simon, et al v. Clarendon National Insurance Company, et a4* Docket No. 98-70941-D, o Judicial District Court, Vermillion Parish. The motion was denied.

[8] Judge Simon heard the motion to recuse all the Judges of the 15th JDC or the Briney & Foret law firm in *Counselman v. Progressive Insurance Co.* The motion was denied.

business day before the hearing. Respondent had asked another attorney to appear at the hearing to argue other motions that had been filed by the Plaintiff. The other attorney had only limited involvement in the case, was not aware of the Defendant's motions served one business day before the hearing, and was unprepared to argue the Defense Motions. All of this was made known to the trial judge, but nevertheless, the Defense Motions were heard and ruled on in favor of the Defendant.

2. Judge Rubin denied three separate Motions filed by the Plaintiff ex parte without affording the Plaintiff a right to a contradictory hearing. The Motions were a Motion to Traverse Certification, a Motion to Enforce Pretrial Order, and a Motion to Continue. The Plaintiff took writs on two of the ex parte denials, and the Third Circuit overturned both denials.

3. Judge Rubin's ruling against the Plaintiff on an evidentiary issue involving the admissibility of seatbelt evidence was overturned by the Third Circuit.

4. Judge Rubin incorrectly struck the Plaintiffs expert witness affidavit from the Plaintiffs Motion for Summary Judgment.

5. When presented with the Motion to Recuse for bias and prejudice, Judge Rubin could have denied the motion as being baseless and having no merit. Instead, Judge Rubin assigned the Motion to Recuse to another Judge for hearing.

6. At the hearing on the Motion to Recuse, Judge Rubin mistakenly represented that he had a telephone conference with both attorneys involved in the litigation regarding the setting of the Defendants' Motion without sufficient

notice. At the hearing of this matter, Judge Rubin testified that he now believes such a telephone conference never occurred.

7. The Respondent believed that Judge Rubin was. biased and prejudiced against him and his client because of the rulings issued. The Respondent obtained the consent of his client before filing the Motion to Recuse. The Respondent realized the seriousness of the allegations contained in the Motion to Recuse and lamented over the filing for several months.

8. There was no actual complainant in these proceedings for Count I with respect to the Motion to Recuse. Judge Rubin did not file an ethical complaint against Simon. The Judges of the 15th Judicial District simply referred the Motion, Memoranda, and transcript of the Hearing to the Office of Disciplinary Counsel for review.

9. The *Simon v. Claredon* case eventually settled after Respondent hired outside counsel to take over and mediate the case. Judge Rubin offered to assist in the settlement of the case after the Motion to Recuse was denied and before the mediation was had. No harm was caused to the Respondent' s client as a result of the filing of the Motion to Recuse.

H.C. Rpt. pgs. 6-8.

Based upon these findings, the Committee did not believe the motion to recuse Judge Rubin in *Simon v. Clarendon National Insurance Co.* was frivolous and found no violation of Rule 3 . 1 (meritorious claims). The Committee was impressed that Judge Rubin, instead of denying the motion on its face, chose to refer it for hearing. Judge Trahan heard the motion, denied the relief, made no finding of a frivolous motion and did not sanction

Respondent. H.C. Rpt. p. 9.

Likewise, the Committee did not find that Respondent violated Rule 3.3(a)(l) (knowingly make a false statement) or Rule 8.2(a) (knowingly make a false statement with reckless disregard for its truth or falsity concerning ajudge) by bringing the recusal motion in *Simon v. Clarendon National Insurance Co.* The Committee found sufficient evidence to support Respondent's action to recuse: Judge Rubin's hearing of a motion without proper notice or time for the Respondent to prepare and appear and his denial of three of Respondent's motion without the benefit of contradictory hearings. Finally, ODC did not prove that Respondent's motion to recuse lacked merit or that Respondent's client was harmed by the motion. H.C. Rpt. pgs. 9-10.

Count II Findings of Fact (Respondent's representation of Leslie Counselman):

1. The hypothetical depicted certain Judges of the 15th Judicial District Court in a negative and derogatory manner. Specifically, the Committee found the comments regarding Judge Rubin and Judge Duplantier to be unethical. The Respondent's statements depict Judge Rubin as playing tennis while he should have been working. The Respondent's hypothetical depicts Judge Duplantier as fishing when he should have been working. The hypothetical further suggests impropriety by the Judges of the *15th* Judicial District Court. The committee found no such evidence.

2. All of the Three-Judge Panel of the Third Circuit concurred that the hypothetical was inappropriate and all concurred that the hypothetical should be removed from the brief. The Panel also concurred that the hypothetical was unnecessary to further the Respondent's arguments. While not all of the Judges believed the hypothetical

violated Rule 2-12.4 of the Uniform Rules of Court of Appeal, the Staff of the Third Circuit was authorized to send a letter to the Respondent stating the hypothetical violated the Rule. The committee found the negative depictions of the Judges playing tennis and fishing when they should have been working had no relevance whatsoever to the Respondent's arguments raised in the writ application.

3. The Clerk of Third Circuit, Kenneth DeBlanc was instructed to and did refer the hypothetical contained in the writ to the ODC.

4. Certain Judges depicted negatively in the hypothetical were upset, insulted, and offended by the hypothetical.

5. While the Respondent's arguments regarding the illegitimacy of the "official capacity doctrine" may have had merit, the hypothetical was unnecessary and simply went beyond the bounds of professionalism and ethical conduct.

6. No personal animosity between the Respondent and certain Judges of the 15th Judicial District Court justifies the Respondent's unethical statements contained in the hypothetical.

7. The Respondent's First Amendment Rights and his skills as a zealous and creative appellate advocate must be balanced with his ethical duty to refrain from falsely and recklessly impugning the integrity of the Judges depicted in the hypothetical. The Respondent's hypothetical clearly impugns the integrity of the Judges. The Respondent's use of the false and reckless depictions is not justified or substantiated merely because the Respondent identified the statements as hypothetical.

H.C. Rpt. pgs. 17-19.

The Committee found Respondent did not violate Rule 3.1 by seeking review of his motion to disqualify the 15th JDC Judges or the law firm of Briney & Foret because of the attorney-client relationship that had existed between them in an unrelated matter.

The Committee found Respondent violated Rules 3.3 and 8.2(a) by knowingly making false statements with reckless disregard concerning certain Judges of the 15th JDC. The Respondent's depiction of some Judges engaging in recreational activities during work hours was of no relevance to his attack on the "official capacity" doctrine. Instead, the Committee interpreted the description of Judge Rubin playing tennis and Judge Duplantier fishing during work hours as an attack on the Judges' integrity.

Count III Findings of Fact (Respondent s representation of Leslie Counselman)

1. An Assignment of Error in a writ application must include statements detailing why the trial judge's ruling was erroneous.[9]
2. None of the Third Circuit Court of Appeals Judges found the language in the Assignment of Error to be unethical or to be a personal attack on Judge Simon. There is no

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[9] ODC Vol. II. Ex. 20. Assignment of Error:
"Judge Simon (Judge *Ad Hoc)* has committed reversible error in the performance of her duties as Judge *Ad Hoc*. Specifically, Judge Simon utilized the wrong standard (subjective) in deciding this issue. In denying plaintiff's Motion to Disqualify/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority but the very principals *[sic]* (honesty and fundamental fairness) upon which our judicial system is based. Judge Simon's denial undermines the efficacy of our jurisprudence, attorney ethics and judicial canons and serves no other purpose but to promote public disrepute and distrust of our legal system. Indeed, Judge Simon's denial of plaintiff's motion is baseless and legally, logically and ethically unsound."

allegation by the ODC or anyone at the Third Circuit that the Assignment of Error violated any Uniform Rule of the Appeals Court. Judge Thibodeaux and Judge Cooks both believed that the language in the Assignment of Error was not extraordinary.

3. While Judge Simon considered the Assignment of Error to be inappropriate, she did not file a complaint with ODC, nor did she seek to sanction the Respondent.

4. Read in its entirety, the Assignment of Error could be interpreted as only an attack on the ruling made by Judge Simon, and not a personal attack.

H.C. Rpt. p. 22.

The Committee found no violation of Rules 8.2(a) or 8.4(d). "The Respondent made no statements that he knew were false, nor did his statements contained in the Assignment of Error rise to the level of reckless disregard. . . . Considering the unanimous testimony of the Third Circuit Judges that the Assignment was neither unethical nor a violation of any Rule of Court," the Committee could not conclude that the Respondent engaged in any conduct that was prejudicial to the administration of justice. H.C. Rpt. p. 23.

The Committee found Respondent violated duties owed to the Judiciary and the legal system and that he "knew that certain statement [s] contained in the colloquy were false, but by labeling them as hypothetical, the Respondent did not knowingly or intentionally mislead the court." H.C. Rpt. p. 24. Although there was potential harm to the public's perception of the judicial system, there was no actual harm to a client. The Committee found the baseline sanction was a public reprimand.

The aggravating factors of prior discipline[10] and substantial experience in the practice of law[11] were found. Mitigating factors were the absence of selfish or dishonest motive and cooperation with the disciplinary process. The Committee was impressed by the Third Circuit Judges who testified that had the Respondent's argument to recuse the 15th JDC Judges in the *Counselman* case been properly raised, the Third Circuit Court of Appeal would have been inclined to grant the motion. The mitigating factors outweighed the aggravating factors; therefore, an upward deviation in the sanction was not warranted.[12]

The Committee recommended Counts I and III be dismissed and that Respondent be publicly reprimanded for violating Rules 3.3 and 8.2(a) in Count II.

ANALYSIS

I. THE STANDARD OF REVIEW

The powers and duties of the Disciplinary Board are

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[10] Respondent was admonished for violating Rule 1.7 conflict of interest; engaged in prohibited representation of adverse parties in contemporaneous litigation. 00-DB-0 17.

[11] Respondent was admitted to the Bar on April 27, 1990.

[12] The Committee found the cases cited by ODC "wholly distinguishable" from the instant matter. *Louisiana State Bar Association v. Kars4* 428 So.2d 406 (La. 1983) and *In re Edward J Larvadain, Jr.*, 664 So.2d 395 (La. 1995). The conduct in both cases was found to be far more egregious. The Committee considered persuasive authority that more closely paralleled the instant matter. *In the Matter of Wilkins*, 782 N.E.2d *985* (Indiana, Feb. 4 2003), Wilkins was publicly reprimanded for statements and suggestions in an appellate brief impugning the integrity of the appellate judges by suggesting that they were determined to find against him, regardless of whether the facts or law supported the decision. In the case of *Kentucky Bar Association v. Heleringer*, 602 S.W.2d *165* (Kentucky 1980), Heleringer was publicly reprimanded for making false and unsubstantiated statements that a trial judge acted in a manner that was "highly unethical and grossly unfair".

defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement .

Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges . . . and prepare and forward to the court its own findings, if any, and recommendations."

In as much as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error". *Arceneaux v. Domingue, 365* So.2d 1330 (La.1978); *Rosell v. Esco,* 549 So.2d 840 (La. 1989). The Board conducts a *de novo* review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill,* 90-DB-004.

II. THE MANIFEST ERROR INQUIRY

The testimony adduced at the hearing and the documents submitted into evidence support the Committees? findings of fact. There is nothing to suggest that the Committee strayed from the facts as supported by the record. The Board finds there is no manifest error.

III. DE NOVO REVIEW OF THE APPLICATION OF THE RULES OF PROFESSIONAL CONDUCT

After reviewing the record in this matter, the Board makes the following determinations concerning the alleged violations of the Rules of Professional Conduct:

Count I:

Rules 3.1, 3.3, 8.2(a) and 8.4(d) have not been violated. Based upon the reversal of several of Judge Rubin's rulings in

Simon v. Claredon, Respondent demonstrated tangible reasons for his belief that a motion to recuse Judge Rubin was warranted. The client was consulted about whether to bring the motion to recuse and supported it.

Count II:

A. Rule 3.1 has not been violated. Several Third Circuit Judges testified that Respondent presented a legitimate issue regarding judicial independence in light of an attorney-client relationship. But for Respondent' s decision to delete the relief of recusing all the 15th JDC Judges, he may have obtained the result that he sought.

B. Rule 3.3 has not been violated. Respondent has not knowingly or otherwise misrepresented a material fact. The hypothetical, which is clearly identified as such, is not a fact nor is it material to the issue presented to the Third Circuit Court of Appeal.

C. The Respondent created a hypothetical to demonstrate what he believed to be the absurdity of the "official capacity" defense used by his opponent. Respondent testified that he made up the scenario of the 15th JDC Judges and Mr. Briney not to demonstrate that the events actually occurred but to demonstrate his belief in the accessibility of his opponent to his former clients and how that prior attorney/client relationship belied the "official capacity" defense. Respondent had no personal knowledge of an alleged telephone conference between his opponent, Mr. Briney, and certain Judges who had been his clients. Judges Duplantier, Edwards, Everett, Rubin and Trahan, all named in the hypothetical, testified at the disciplinary hearing.

Judge Duplantier testified that he was personally insulted

by the hypothetical. Judge Rubin viewed it as a "bad joke" and expressed concern for how his fellow Judges were portrayed. Judge Everett considered the hypothetical comical and juvenile but expressed concern over how the other Judges might feel. Judge Edwards said he was "flattered" that he was mentioned but expressed his concern about the characterization of some Judges not working hard. Judge Trahan did not express an opinion on the characterization of the Judges.

To the extent that Respondent may have impugned the integrity of the 15th Judicial District Court Judges, he has technically violated Rule 8.2(a). Respondent's use of real names, identifiable hobbies and interests and actual cases shifted the focus from hypothetical to real people. However, Respondent's hypothetical was not intended to impugn the integrity of the Judges but to defeat the "official capacity" defense.

ANALYSIS

The purpose of the hypothetical was to demonstrate Respondent? s frustration with the "official capacity" defense used by Mr. Briney. He offered the hypothetical for one purpose, only to have the purpose disintegrate into an unintended result. His actions were not calculated to outrage but to persuade. While certain Judges were offended, there was no demonstrable harm to the Judges or the client. Neither the 15th Judicial District Court nor the Third Circuit Court of Appeal sanctioned Respondent for the hypothetical.

In the case of *In re Hartley,* 03-2828 (La. 4/02/04); 869 So.2d 799, formal charges were brought against Hartley for instructing another attorney to notarize a document which stated that the affiant and the witness appeared before the notary when they had not. The Court determined the conduct was a minor violation of the Rules but was not the "product of an evil or

dishonest motive nor did they cause any actual harm." *Id.* at p. 2,799.

CONCLUSION

In the instant matter, the hypothetical was born out of Respondent's zeal to represent his client not to harm the Judges of the 15th Judicial District Court. While several Judges expressed concern for how their fellow Judges might have felt and one Judge was personally insulted, there was no actual harm to anyone. While a technical violation of Rule 8.2(a) exists, the conduct does not rise to the level of a sanction.

The ruling of the Board was not an easy one and the voice of dissent was cogent and persuasive. Significant to the Board's decision, however, was the Respondent's lack of malice or ill will in putting forth the hypothetical and his desire and duty to zealously represent his client. The Board finds Respondent's conduct falls well short of the goals of professionalism and Respondent would be well served to abstain from such conduct in the future.

For the forgoing reasons, the Board finds the Respondent has technically violated Rule 8.2(a) of Count II but that his misconduct does not rise to the level of a sanction.

RULING

Accordingly,

IT IS HEREBY ORDERED that the Formal Charges against J. Clemille Simon, be and are hereby DISMISSED.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

REGINALD R. BROWN, SR.
RICHARD Eo GERARD, JR.
DENNIS W. HENNEN
BILLY R. PESNELL

BY:_____
JOSEPH R. WARD, JR
FOR THE ADJUDICATIVE COMMITTEE

PETER T. DAZZIO – Not participating
LEV M. DAWSON – Concurs with reason.
CHRISTOPHER H. RIVIERE – Dissents with reason.
JACK 0. WHITEHEAD, JR. - Dissents with reason.

LEV M. DAWSON
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October 26, 2004

Louisiana Attorney Disciplinary Board
2800 Veterans Memorial Blvd. , Suite 310
Metairie, LA 70002

RE: J. Clemille Simon
Number 02-DB-029
Concurring Opinion

Although Mr. Simon has not displayed an excess of discretion, he has clearly been given cause to protest his treatment. Judge Rubin showed clear bias and a through disregard for the rules of procedure. Judge Rubin brought up unscheduled motions and ruled against Mr. Simon while Mr. Simon was out of the country. Judge Rubin made statements against Mr. Simon in this proceeding which he saw fit to "withdraw."

It is, therefore, nonsense to assert that Mr. Simon "attacked Judge Rubin's judicial integrity without any reasonable factual basis for doing so."

As for the claim that the Judges of the 15th Judicial District, were conflicted in Charge II, I cannot see how that is an unreasonable contention. The hypothetical telephone conversation may be colorful but Mr. Simon had clear and convincing reasons for their recusal since their collective attorney was opposed to Mr. Simon. The judges of the third circuit had plenty of sanctions available to them which they chose not to apply.

I find myself more shocked at the judicial behavior evidenced

in this case than any actions of Mr. Simon, and therefore concur that Mr. Simon not be sanctioned in any way.

Sincerely,

Lev M. Dawson

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: J. CLEMILLE SIMON -- 02-DB-029
DISSENT OF CHRISTOPHER H. RIVIERE

I respectfully dissent from the findings of the majority in recommending a dismissal of the formal charges. I feel that the respondent's conduct in this case should be sanctioned.

The respondent, in my view, undertook actions which were designed to call into question the integrity of members of the judiciary, as well as the integrity of the court's ability to administer justice fairly. Failing to sanction this respondent for his reckless and malicious conduct, I feel will open the door to unrestrained criticism of the judiciary and will send a message to the Bar that this type conduct will not be within reach of the disciplinary system.

Christopher H Riviere
October 25, 2004

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: J. CLEMILLE SIMON
DOCKET NO.: 02-DB-029
DISSENT

I strongly dissent with the Ruling of the Board and respectfully join in the written reasons as stated by Mr. Christopher H. Riviere.

By: _____
Jack O. Whitehead, Jr.

The Louisiana Attorney Disciplinary Board

Number 02-DB-029
In re J. Clemille Simon
Addendum "A" ODC Vol. I, Ex. 2(a) and H.C. Rpt. pgs. I 1-16.

The following hypothetical was initially included in Respondent's application for writs to the Third Circuit Court of Appeal.

Hypothetical Telephone Conversation Between Patrick J. Briney and His Clients (Judges of The Judicial District Court)

Patrick Briney:	Ring. . . ring. . .ring...
Judge Everett:	Hello?
Patrick Briney:	Glen?
Judge Everett:	Yes...
Patrick Briney:	Hi Glen, this is Pat. . . how are you my good friend?
Judge Everett:	Hey Pat...I?m doing fine. . . how are you?

Patrick Briney: I can't complain. . . although I'm having to work more than I'd like especially since Simon is trying to disqualify me.

Judge Everett: Yeah, that's an interesting situation. I'm told Ed dismissed the motion without even allowing a hearing.

Patrick Briney: Yeah. . . we made Simon take writs to the Supreme Court. . . Of course, they reversed and remanded.

Judge Everett: So I heard.

Patrick Briney: Yeah. . .lucky for us they appointed Judge Anne Simon. . . she's made short shrift of Simon's motion. . .thank God she reversed her previous discovery ruling and didn't allow Simon to take my deposition. . . I think I dodged a bullet there...

Judge Everett: Yeah, what's Simon going to do now?

Patrick Briney: Oh, if history is any indication, he'll take writs. We should be alright since Judge Simon denied Simon's motion and I did not have to disclose all of the details of our relationship.

Judge Everett: Well, Pat what can I do for you today?

Patrick Briney: I was calling about the situation in *State v. Cavazos* . .. are you wearing your official black judicial robe?

Judge Everett: Hold on. . . it's hanging right here. . .let me put it on.

Patrick Briney: Great, now we can talk about *State v. Cavazos* because, as you know, I only represent you all in your "official capacity." What are we going to do if the Supreme Court grants Attorney Block's writ?

Judge Everett: Hell. . .I don't know. . . we probably should get Judge Edwards on the phone

since he has taken my place as chief judge.

Patrick Briney: Good idea. . . I happen to have his personal cell phone number right here, I'll try to conference him now. (pause)

Judge Edwards: Hello?

Patrick Briney: Jules. . . it's Pat. . . I've got Glen on the line.

Judge Edwards: Hey Pat. . .hey glen. . .what's up?

Patrick Briney: I had called Glen to talk about *State v. Cavazos.*

Judge Everett: And I figured since you were now chief judge that we should get you on the phone.

Patrick Briney: You have your official black judicial robe handy?

Judge Edwards: I'm actually at the National Guard headquarters and don't have my official black judicial robe.

Patrick Briney: Well. . .you probably should participate becaus, as you know, I only represent you all in your "official capacity."

Judge Everett: Fortunately, Pat caught me at my office and I have my robe on.

Patrick Briney: Well, Jules. . . with your permission we?ll continue to discuss *State v. Cavazos* without you. I'll give you a call later. Will you have your robe and shall I call you at home or on your cell phone?

Judge Edwards: I'll be home and yes I'll have my robe so we can talk then.

Patrick Briney: Great, we'll talk then. Bye Jules.

Judge Edwards: Bye Pat. . .bye Glen.

Judge Everett: Bye Jules.

Patrick Briney: Well, what next?

Judge Everett: Let's try to get Ed on the phone.

Patrick Briney: Good idea, I happen to also have his

private cell phone number. Chances are, however, he'll be on the tennis courts and won't have his official black judicial robe handy.

Judge Everett: He sure does love that tennis!

Judge Rubin: Hello?

Patrick Briney: Ed, hello this is Pat, I've got Glen on the line.

Judge Rubin: Hey Pat, hey Glen. . .how you all doing?

Patrick Briney: Great.

Judge Everett: Working as usual. . .what are you doing, playing tennis?

Judge Rubin: Of course, I've got to practice. . . Chanda is coming home next week and I know sha?ll want to play. By the way Glen, do you think you can cover my cases so that I can play tennis with Chanda next week?

Judge Everett: Not a problem, next week is my office week.

Judge Rubin: Great. So what's up?

Patrick Briney: I was calling to talk about *State v. Cavazos.*

Judge Rubin: Is that the case where Simon is raising hell and trying to disqualify you?

Patrick Briney: Not exactly. . . Simon is trying to disqualify me in that civil case pending before you. Remember, you denied his motion without a hearing?

Judge Rubin: Oh yeah. . . *State v. Cavazos* is the one where Block is causing trouble.

Patrick Briney: That's right. Wouldn't it be nice if Simon and Block would just do like most others and let us do what we please?

Judge Rubin: Are you kidding? Simon is Minos' son and Block used to work for Minos.

Patrick Briney: I guess it's true what they say. . .the acorn doesn't fall far from the tree. . . Heaven help us.

Judge Rubin: Well, if we are going to talk about *State v. Cavazos* I'll have to get my official black judicial robe out of my Mercedes and put it on. . .hold on a minute. (pause)

Judge Rubin: Ok. . .let's talk.

Patrick Briney: Shouldn't we also get Tommy on the phone since he was primarily responsible for establishing the misdemeanor department and in hiring me and my firm?

Judge Everett: Perhaps.

Judge Rubin: Yeah.

Patrick Briney: Good thing I also have his private cell phone number, I'll bet he's fishing or hunting with my partner. My how those two love to hunt and fish.

Judge Rubin: Almost as much as I love to play tennis, ha. . .ha. . . ha. (pause)

Judge Duplanter: Hello?

Patrick Briney: Tommy, Pat here, I've got Glen and Ed on the phone. . .what are you doing my good friend?

Judge Duplantier: Trying to teach your partner how to fish. . . might I add he's not learning very well.

Patrick Briney: Hell, he never works because he's either fishing or hunting, he should be a pro by now.

Judge Rubin: Where are you two fishing?

Judge Duplantier: In the Gulf, I'm surprised that you were able to reach me.

Judge Everett: Pat said you would be fishing. .he knows you pretty well.

Judge Duplantier:	Almost as well as his partner I'd expect. So what's up?
Judge Everett:	Pat was calling to talk about *State v. Cavazos*.
Patrick Briney:	Did you happen to bring your robe fishing with you Tommy?
Judge Duplantier:	No, I left it hanging in my office when I left Wednesday to come fishing.
Patrick Briney:	Well, since I?ve taken the position with Simon that I only present you all in an "official capacity" it's probably best that we not talk without you wearing your robe, after all, when I testified, I took an oath.
Judge Rubin:	Ok then, I guess I can get back to my tennis game?
Foret (Briney's Partner):	I've got a big one . . . get the gaff Tommy!
Judge Duplantier:	Gotta go guys. . . Charlie has finally caught a fish.
Patrick Briney:	Ok. Tell you what. . .how about we all get together at Ruth Chris' Steakhouse Sunday night. . . I'll reserve a private room. My treat! You all bring your robes. . . we'll eat dinner and then discuss what we will do next in *State v. Cavazos*.
Judge Everett:	See you all then. Bye bye.
Judge Rubin:	Can I bring Chanda?
Patrick Briney:	Certainly, I want an autograph.
Judge Rubin:	You got it. . . see you Sunday.
Judge Duplantier:	Adios.

APPENDIX C

HEARING COMMITTEE OPINION

THE LOUISIANA ATTORNEY DISCIPLINARY BOARD

NUMBER: 02-DB-029

IN RE: J. CLEMILLE SIMON

REPORT OF HEARING COMMITTEE NUMBER SEVEN

BRIEF FACTUAL SETTING

Formal charges were filed by the Office of Disciplinary Counsel ("ODC") in this matter on March 8, 2002 The charges consisted of three counts against the respondent, J. Clemille Simon ("Simon"). All of the counts arise from statements made in pleadings that "ODC" contends violate the Rules of Professional Conduct. Essentially, ODC contends that the language contained in the pleadings unfairly and unethically attacks the judiciary and specifically certain judges discussed in the pleadings. Count I arises from a Motion to Recuse filed by Simon against Judge Edward Rubin.

Count II arises from a writ application filed by Simon with the Louisiana Court of Appeals, Third Circuit. The writ was filed by Simon in a case entitled *Counselman* v *Progressive Insurance Co.* that was pending in the 15th Judicial District. Simon represented the Plaintiff. Simon had sought at the trial court to have the defense counsel for Progressive, Pat Briney, disqualified from the case and sought to have the Judges of the 15th Judicial District recused. The basis for the disqualification and the recusal was that Mr. Briney represented the Judges in another matter. In the Writ application, Simon argued only that Mr. Bnney should be

disqualified. To support his position, he included a hypothetical in which he depicted a conversation between Mr. Briney and his clients, the Judges of the 15th Judicial District. ODC contends that the content and context of the hypothetical violated the Rules of Professional Conduct.

Count III also involves the writ application. The ODC contends that an assignment of error contained therein personally attacked Judge Anne Simon in violation of the Rules of Professional Conduct. Count III is based solely upon the one paragraph assignment of error contained in the writ application.

This matter was heard on May 12, May 13, and November 18, 2003. The hearing lasted three full days. Additionally, the hearing committee reviewed a video deposition of Judge Simon as was stipulated to by ODC and Respondent Simon. During the course of the three day trial, the Hearing Committee heard testimony from four of the Judges from the Third Circuit Court of Appeal, five of the Judges from the 15th Judicial District, and eight lay witnesses including the Respondent.

After hearing all of the testimony, after an additional review of the transcript, after hearing the arguments of both counsel for the ODC and for the Respondent, after reviewing the post trial memoranda, and after reviewing in detail the formal charges and the Rules of Professional Conduct, the committee concludes as follows:

1. Count I- The ODC failed to prove by clear and convincing evidence that Simon's actions as contained in Count I of the Formal Charges violated the cited Rules of Professional Conduct. Count I should be dismissed.

2. Count II- The ODC proved by clear and convincing evidence that Simon's actions as

contained in Count II of the Formal Charges violated the Rules of Professional Conduct. The Committee recommends that Simon be sanctioned with a Public Reprimand, be ordered to attend four hours of professionalism classes for each of the next three years, and be ordered to pay all costs which are related to Count II.

3. Count III- The ODC failed to prove by clear and convincing evidence that Simon's actions as contained in Count III of the Formal Charges violated the cited Rules of Professional Conduct. Count III should be dismissed.

FORMAL CHARGES

COUNT 1

You represented Joey and Sandra Simon, plaintiffs in a personal injury lawsuit that you filed in Vermillion Parish, which was assigned to Judge Edward Rubin of the 15TH JDC. After Judge Rubin ruled against you in several pre-trial motions, you brought a Motion to Recuse seeking to remove Judge Rubin from the case and personally attacked his judicial integrity without any reasonable factual basis for doing so.

Again, without any factual basis for doing so, you improperly accused Judge Rubin of "embarking upon a campaign of misrepresenting the truth," further asserting that he had "made intentional misrepresentations of fact, for the purpose of prejudicing (you) and (your clients)." Your conduct violates Rule 8.23(a).

In support of your motion to recuse, you cited substantive rulings Judge Rubin made which you contend were improper and without legal support, yet Judge Rubin was affirmed by the

appellate court on virtually all substantive issues raised by your writ applications. In the hearing on the motion to recuse, you were unable to produce any identifiable evidence of Judge Rubin's bias or personal animus against you or your client, despite your claims that such evidence existed. Another judge appointed to hear the recusal motion denied same immediately after the hearing was concluded. Your conduct violates Rules 3.1 and 3.3 of the Rules of Professional Conduct.

Your actions in bnnging a groundless and frivolous motion to recuse Judge Rubin caused delay in the prosecution of your clients' case and diverted the court's attention from other, substantial court business. Your conduct violates Rule 8.4(d) of the Rules of Professional Conduct.

COUNT II

In another personal injury case *(Counselman v. Progressive Insurance Co.)* you brought yet another motion to recuse the entire 15th Judicial District Court from hearing any cases where Patrick Briney or his firm was representing the opposing party. After the *ad hoc* judge appointed to hear your motion denied same after a hearing, you filed a writ application with the 3rd Circuit Court of Appeals. In that application, you created a wholly fictitious telephone conversation, which you allege accurately represented verbal communications between your opposing counsel and the judges of the 15th JDC. The judges and opposing counsel are depicted in that conversation as conspiring to deprive both you and your client of substantive rights and to subvert the justice system.

Upon reviewing the contents of that fictitious telephone conversation, the Judges of the Third Circuit Court of Appeals refused to accept your writ application for filing and instructed the clerk to return it to you, with instructions to remove the "hypothetical" conversation. The Court also found your brief to

be "replete with insulting, abusive, discourteous and irrelevant matter" in violation of Rule 2-12.4 of the Uniform Rules of the Court of Appeal.

Although you removed the offending conversation from the brief, you nonetheless continued to insist that your depiction represented a "truthful portrayal" of communications you alleged occurred among Mr. Briney and the judges of the 15th JDC, despite the fact that there is no evidence that any conversation such as you described ever took place. Your conduct violates Rules 3.1, 3.3 and 8.2(s) of the Rules of Professional Conduct.

COUNT III

Judge Anne Lennan Simon was appointed *ad hoc* by the Louisiana Supreme Court to hear your recusal motion brought against the judges of the 15th JDC. After a full hearing, Judge Simon dismissed your motion and assigned written reasons. In appealing her decision, you wrote in your writ application to the Third Circuit Court of Appeals that Judge Simon "violated not only controlling legal authority but the very principles *(sic)* (honesty and fundamental fairness) upon which our judicial system is based." Your conduct violates Rule 8.2(a) and 8.4 (d) of the Rules of Professional Conduct.

COUNT I: ANALYSIS OF THE EVIDENCE AND FINDINGS OF FACT

The ODC alleged that Simon brought a "groundless and frivolous motion to recuse" without "proper legal authority" and which attacked Judge Edward Rubin's "judicial integrity without any reasonable factual basis." With specific reference to Count I, the ODC offered substantial testimony from Judge Edward Rubin, Judge Glennon Everett, Judge John Trahan, and Michael Cory. The ODC also offered rebuttal testimony from Judge Rubin's law clerk Karen Haith.

The Respondent alleged that the Motion to Recuse had merit and was filed with proper legal authority. Further, the Respondent contended that Judge Rubin had made numerous improper rulings on motions involving discovery, pretrial procedure, notice, evidence, and continuances such that his client viewed Judge Rubin as biased and prejudiced. The Respondent contended that these improper rulings severely prejudiced the Plaintiff and justified the filing of the Motion to Recuse. The Respondent's witnesses for Count I were Rebecca Terrell, Barry Domingue, Joseph Quentin Simon, and the Respondent, J. Clemille Simon.

The testimony revealed that the Respondent represented the Plaintiff in the matter of *Sandra Simon v. Claredon Insurance.* The case involved a rear end collision and involved significant damages. The insurance company was represented by the firm of Briney and Foret, specifically Michael Corry. The testimony revealed that the litigation was quite contentious and that Judge Rubin had no real relationship whatsoever with either of the lawyers prior to the litigation.

During the course of the litigation there were numerous motions filed by both sides. Most of the Motions were decided by Judge Rubin in favor of the defendant insurance company. On many of the rulings, the Plaintiff filed writ applications and had the rulings overturned by the Third Circuit. All of the Motions, Memoranda, Judgments, Orders, Writ Applications, and Rulings of the Third Circuit were made part of the record and reviewed by the Committee. Additionally, all of these exhibits and the context of the documents were discussed in detail in the testimony of Michael Corry, Judge Rubin, and the Respondent. The Committee's analysis of the documentary evidence and the testimony of Michael Cony, Judge Rubin, and Simon established the following facts:

1. Judge Rubin set three of the Defendant's Motion's to be heard without proper notice or sufficient time for the Plaintiff to Respond. The Motion's were filed, set, heard, and ruled on while the Respondent was out of the country. The Motions and Notice of Hearing were served one business day before the hearing. Respondent had asked another attorney to appear at the hearing to argue other motions that had been filed by the Plaintiff. The other attorney had only limited involvement in the case, was not aware of the Defendant's motions served one business day before the hearing, and was unprepared to arguethe Defense Motions. All of this was made known to the trial judge, but nevertheless, the Defense Motions were heard and ruled on in favor of the Defendant.

2. Judge Rubin denied three separate Motions filed by the Plaintiff ex parte without affording the Plaintiff a right to a contradictory hearing. The Motions were a Motion to Traverse Certification, a Motion to Enforce Pretrial Order, and a Motion to Continue. The Plaintiff took writs on two of the ex parte denials, and the Third Circuit overturned both denials.

3. Judge Rubin's ruling against the Plaintiff on an evidentiary issue involving the admissibility of seatbelt evidence was overturned by the Third Circuit.

4. Judge Rubin incorrectly struck the Plaintiffs expert witness affidavit from the Plaintiffs Motion for Summary Judgment.

5. When presented with the Motion to Recuse for bias and prejudice, Judge Rubin could have denied the motion as being baseless and having no merit. Instead, Judge Rubin assigned the Motion to Recuse to another Judge for hearing.

6. At the hearing on the Motion to Recuse, Judge Rubin mistakenly represented that he had a telephone conference with both attorneys involved in the litigation regarding the setting of the Defendants' Motion without sufficient notice. At the hearing of this matter, Judge Rubin testified that he now believes such a telephone conference never occurred.

7. The Respondent believed that Judge Rubin was biased and prejudiced against him and his client because of the rulings issued. The Respondent obtained the consent of his client before filing the Motion to Recuse. The Respondent realized the seriousness of the allegations contained in the Motion to Recuse and lamented over the filing for several months.

8. There was no actual complainant in these proceedings for Count I with respect to the Motion to Recuse. Judge Rubin did not file an ethical complaint against Simon. The Judges of the 15th Judicial District simply referred the Motion, Memoranda, and transcript of the Hearing to the Office of Disciplinary Counsel for review.

9. The *Simon v. Claredon* case eventually settled after Respondent hired outside counsel to take over and mediate the case. Judge Rubin offered to

assist in the settlement of the case after the Motion to Recuse was denied and before the mediation was had. No harm was caused to the Respondent's client as a result of the filing of the Motion to Recuse.

The Committee was not required to make significant credibility calls at trial with regard to Count I. The testimony of all witnesses was generally consistent as is depicted above. Any inconsistent testimony was pointed out effectively by counsel of ODC and by counsel for the Respondent through effective cross-examination and by referring the witnesses to the numerous pleadings that were offered.

COUNT I: APPLICATION OF RULES TO ANAYSIS OF EVIDENCE AND FINDINGS OF FACT

The ODC in Count I alleged that Simon violated Rule 3 .1 which provides:

Rule 3. 1 *Meritorious Claims and Contentions*

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The ODC had the burden to show by clear and convincing evidence that the Respondent violated Rule 3.1. The ODC failed to carry its burden. The Committee cannot conclude by clear and convincing evidence based upon the testimony and exhibits

presented that the Motion to Recuse had no basis in law and fact. The issue is not whether the Respondent won the Motion to Recuse, but instead whether the Motion to Recuse was frivolous. The Committee cannot reach the conclusion by clear and convincing evidence that the Motion to Recuse was frivolous.[1]

> The ODC in Count I alleged that Simon violated Rule 3.3 which provides:
>
> Rule 3.3(a)(1)) *Candor Toward the Tribunal*
>
> (a) A lawyer shall not knowingly:
>
> (1) Make a false' statement of material fact or law to a tribunal.

The Committee does not conclude that the ODC proved by clear and convincing evidence that Simon made false statements in violation of Rule 3 .3 . Simon believed at all times that the Motion to Recuse had merit. The evidence presented to the Committee proved that Simon's client could have reasonably believed that Judge Rubin's rulings necessitated the Motion to Recuse. Simon presented to the committee "identifiable evidence" for the Recusal Motion in direct contravention to the allegations contained in Count I. Also, Simon presented evidence to show that numerous rulings of Judge Rubin were overturned by the Third Circuit. Again, this directly contradicted the allegations contained in Count I.

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[1] "It is specifically noted that the trial judge who heard the Motion to Recuse had the authority to sanction the Respondent under Louisiana Code of Civil Procedure art. 863. The language of art. 863 and Rule 3.1 are extremely similar. The trial judge chose to impose no sanction on the Respondent. It is also specifically noted again that Judge Rubin could have denied the Motion to Recuse on its face without a hearing if it was frivolous. Judge Rubin chose to refer it to hearing."

The ODC in Count I alleged that Simon violated Rule 8.2(a) which provides:

Rule 8. 2(a) *Judicial and Legal Official*

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

The Committee finds no violation of Rule 8.2(a). The Respondent filed a Motion to Recuse in which he alleged bias or prejudice. It was undisputed among all of the witnesses that such allegations of bias or prejudice were essential to the Motion to Recuse. The ODC takes an excerpt from the Motion to Recuse to allege that improper accusations were made as to Judge Rubin. The Committee considered not only the excerpt, but the entire Motion as well as the testimony and supporting documents. ODC failed to carry its burden in showing that any comments were made by Simon with reckless disregard as to the truth or falsity ofthe allegations.

The ODC in Count I alleged that Simon violated Rule 8.4(d) which provides:

Rule 8. 4 *Misconduct*

It is professional misconduct for a lawyer to:
(d) Engage in conduct that is prejudicial to the administration of justice.

The Committee finds that Simon did not violate Rule 8.4. The ODC failed to prove by clear and convincing evidence that the Motion to Recuse lacked merit. Therefore, the Committee

cannot conclude that the filing ofthe Motion was prejudicial to the administration ofjustice. There was no evidence presented that the Motion to Recuse prejudiced the Respondent's client.

The Committee additionally notes that the Formal Charges in Count I did not assert any unethical behavior regarding the Respondent's cross-examination of Judge Rubin at the Motion to Recuse. There was testimony from Judge Trahan and Judge Everett that the Respondent acted in an inappropriate manner toward Judge Rubin by keeping him on the stand for nearly five hours, by being argumentative, and by asking repetitive questions. Judge Trahan allowed the questioning and took no action toward the Respondent. The Committee can only consider the formal charges and the Counts contained therein. Because these allegations were not specifically contained in Count I or elsewhere in the formal charges, the Committee takes no action and did not consider Respondent's actions at the hearing of the Motion to Recuse.

COUNT II: ANALYSIS OF THE EVIDENCE AND FINDINGS OF FACT

In Count II the ODC alleged that the Respondent included an unnecessary and unethical hypothetical in a writ application to the Third Circuit Court of Appeals. The hypothetical reads as follows:

Hypothetical Telephone Conversation Between Patrick J. Briney and His Clients (Judges of The 15th Judicial District Court)

Patrick Briney:	Ring. . .ring. . .ring...
Judge Everett:	Hello?
Patrick Briney:	Glen?
Judge Everett:	Yes...

Patr[illegible]riney:	Hi Glen, this is Pat. . .how are you my good friend?
Judge Everett:	Hey Pat...I'm doing fine. . .how are you?
Patrick Briney:	I can't complain. . .although I'm having to work more than I'd like especially since Simon is trying to disqualify me.
Judge Everett:	Yeah, that's an interesting situation. I'm told Ed dismissed the motion without even allowing a hearing.
Patrick Briney:	Yeah. . . we made Simon take writs to the Supreme Court...Of course, they reversed and remanded.
Judge Everett:	So I heard.
Patrick Briney:	Yeah. . .lucky for us they appointed Judge Anne Simon. ... she's made short shrift of Simon's motion. . .thank God she reversed her previous discovery ruling and didn't allow Simon to take my deposition. . .I think I dodged a bullet there...
Judge Everett:	Yeah, what's Simon going to do now?
Patrick Briney:	Oh, if history is any indication, he'll take writs. We should be alright since Judge Simon denied Simon's motion and I did not have to disclose all of the details of our relationship.
Judge Everett:	Well, Pat what can I do for you today?
Patrick Briney:	I was calling about the situation

in *State v. Cavazos*... are you wearing your official black judicial robe?

Judge Everett: Hold on. . .it's hanging right here. . .let me put it on.

Patrick Briney: Great, now we can talk about *State v. Cavazos* because, as you know, I only represent you all in your "official capacity." What are we going to do if the Supreme Court grants Attorney Block's Writ?

Judge Everett: Hell. . .I don't know. . . we probably should get Judge Edwards on the phone since he has taken my place as chief judge.

Patrick Briney: Good idea. . . . I happen to have his personal cell phone number right here, I'll try to conference him now. (pause)

Judge Edwards: Hello?

Patrick Briney: Jules. . . it's Pat. . . I've got Glen on the line.

Judge Edwards: Hey Pat. . .hey Glen. . .what's up?

Patrick Briney: I had called Glen to talk about *State v. Cavazos*.

Judge Everett: And I figured since you were now chief judge that we should get you on the phone.

Patrick Briney: You have your official black judicial robe handy?

Judge Edwards: I'm actually at the National Guard headquarters and don't have my official black judicial robe.

Patrick Briney: Well. . .you probably should participate because, as you know,

	I only represent you all in your "official capacity."
Judge Everett: .	Fortunately, Pat caught me at my office and I have my robe on.
Patrick Briney:	Well, Jules. . . with your permission we'll continue to discuss *State v. Cavazos* without you. I'll give you a call later. Will you have your robe and shall I call you at home or on your cell phone?
Judge Edwards:	I'll be home and yes I'll have my robe so we can talk then.
Patrick Briney:	Great, we'll talk then. Bye Jules.
Judge Edwards:	Bye Pat. . . bye Glen.
Judge Everett:	Bye Jules.
Patrick Briney:	Well, what next?
Judge Everett:	Let's try to get Ed on the phone.
Patrick Briney:	Good idea, I happen to also have his private cell phone number. Chances are, however, he'll be on the tennis courts and won't have his official black judicial robe handy.
Judge Everett:	He sure does love that tennis!
Judge Rubin:	Hello?
Patrick Briney:	Ed, hello this is Pat, I've got Glen on the line.
Judge Rubin:	Hey Pat, hey Glen. . . how you all doing?
Patrick Briney:	Great.
Judge Everett	Working as usual what are you doing, playing tennis?
Judge Rubin:	Of course, I've got to practice. . Chanda is coming home next

week and I know she'll want to play. By the way Glen, do you think you can cover my cases so that I can play tennis with Chanda next week?

Judge Everett — Not a problem, next week is my office week

Judge Rubin: — Great. So what's up?

Patrick Briney: — I was calling to talk about *State v. Cavazos*.

Judge Rubin — Is that the case where Simon is raising hell and trying to disqualify you?

Patrick Briney — Not exactly Simon is trying to disquaify me in that civil case pending before you. Remember, you denied his motion without a hearing?

Judge Rubin: — Oh yeah. . . *State v. Cavazos* is the one where Block is causing trouble.

Patrick Briney — That's right Wouldn't it be nice if Simon and Block would just do like most others and let us do what we please?

Judge Rubin — Are you kidding? Simon is Minos' son and Block used to work for Minos.

Patrick Bnney — I guess it's true what they say the acorn doesn't fall far from the tree. . . Heaven help us.

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Judge Rubin:	Ok. . . . let's talk.
Patrick Briney:	Shouldn't we also get Tommy on the phone since he was primarily responsible for establishing the misdemeanor department and in hiring me and my firm?
Judge Everett:	Perhaps.
Judge Rubin:	Yeah.
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Judge Rubin:	Almost as much as I love to play tennis, ha. . . ha. . . ha. (pause)
Judge Duplanter:	Hello?
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Judge Duplantier	Trying to teach your partner how to fish might I add he's not learning very well.
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Judge Duplantier:	In the Gulf, I'm surprised that you were able to reach me.
Judge Everett:	Pat said you would be fishing. . .he knows you pretty well.
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Judge Duplantier:	No, I left it hanging in my office when I left Wednesday to come fishing.
Patrick Briney	Well, since I've taken the position with Simon that I only present you all in an "official capacity" it's probably best that we not talk without you wearing your robe, after all, when I testified, I took an oath.
Judge Rubin:	Ok then, I guess I can get back to my tennis game?
Foret (Briney's Partner):	I've got a big one get the gaff Tommy!
Judge Duplantier:	Gotta go guys. . . Charlie has finally caught a fish.
Patrick Briney:	Ok. Tell you what. . . how about we all get together at Ruth's Chris Steakhouse Sunday night. . .I'll reserve a private room. My treat! . You all bring your robes. . . we'll eat dinner and then discuss what we will do next in *State v. Cavazos*.
Judge Everett:	See you all then. Bye bye.
Judge Rubin:	Can I bring Chanda?
Patrick Briney:	Certainly, I want an autograph.
Judge Rubin:	You got it. . . see you Sunday.
Judge Duplantier:	Adios.

The ODC contended that the hypothetical violated Rule 2-12.4 of the Uniform Rules of Court of Appeal. The Respondent was told by the Third Circuit to remove the hypothetical. Thereafter, the Respondent removed the hypothetical, but included a footnote in the revised writ to suggest that the

hypothetical was a "truthful portrayal" Essentially, the ODC alleged that Respondent made false statements to a tribunal, offered evidence the Respondent knew was false, and that these statements were directly related to the qualifications and integrity of the Judges of the 15th Judicial District in violation of the Rules of Professional Conduct. The ODC offered testimony from Judge Rubin, Judge Everett, and Judge Duplantier from the 15th Judicial District, all of whom were depicted in the hypothetical. The ODC offered testimony from Judge Peters, Judge Thibodeaux, and Judge Decuir who comprised the three-judge writ panel who reviewed and decided the Writ application. The ODC also offered the testimony of Patrick Briney, the attorney depicted in the hypothetical, and Kenneth DeBlanc, the clerk of the Third Circuit. The ODC also offered the testimony of Judge Anne Simon by video deposition regarding the denial of the Motions at the trial court which led to the Respondent filing the Writ application. The Respondent contended that the hypothetical was not a violation of Rule 2-12.4 of the Uniform Rules of Court of Appeal. The Respondent contended that the hypothetical was necessary to illustrate the invalidity of the defense raised by Mr Briney in the Motion to Disqualify and the subsequent Writ application. The Respondent contended that his statements were protected by the First Amendment of the United States Constitution. Most interestingly, the Respondent claimed that because the statements were labeled as a "hypothetical", the falsity of the statements was obvious, and therefore, could not be considered an attack on the integrity of the Judges. The Respondent offered the testimony of Judge Cooks and Judge Thibodeaux of the Third Circuit. The Respondent offered testimony from Judge Edwards of the 15th Judicial District. Additionally, the Respondent offered testimony from Rebecca Terrell, Joseph Quentin Simon, and the Respondent.

After hearing the testimony of all of the witnesses, reviewing the writ application numerous times, and reviewing the other relevant exhibits, the Committee made the following

findings of facts and conclusions:

1. The hypothetical depicted certain Judges of the 15th Judicial District Court in a negative and derogatory manner. Specifically, the Committee found the comments regarding Judge Rubin and Judge Duplantier to be unethical. The Respondent's statements depict Judge Rubin as playing tennis while he should have been working. The Respondent's hypothetical depicts Judge Duplantier as fishing when he should have been working. The hypothetical further suggests impropriety by the Judges of the 15th Judicial District Court. The committee found no such evidence.
2. All of the Three-Judge Panel of the Third Circuit concurred that the hypothetical was inappropriate and all concurred that the hypothetical should be removed from the brief. The Panel also concurred that the hypothetical was unnecessary to further the Respondent's arguments. While not all of the Judges believed the hypothetical violated Rule 2-12.4 of the Uniform Rules of Court of Appeal, the Staff of the Third Circuit was authorized to send a letter to the Respondent stating the hypothetical violated the Rule. The committee found the negative depictions of the Judges playing tennis and fishing when they should have been working had no relevance whatsoever to the Respondent's arguments raised in the writ application.
3. The Clerk of Third Circuit, Kenneth DeBlanc was instructed to and did refer the hypothetical contained in the writ to the ODC.
4. Certain Judges depicted negatively in the hypothetical were upset, insulted, and offended by the hypothetical.

5. While the Respondent's arguments regarding the illegitimacy of the "official capacity doctrine" may have had merit the hypothetical was unnecessary and simply went beyond the bounds of professionalism and ethical conduct.
6. No personal animosity between the Respondent and certain Judges of the 15th Judicial District Court justifies the Respondent's unethical statements contained in the hypothetical.
7. The Respondent's First Amendment Rights and his skills as a zealous and creative appellate advocate must be balanced with his ethical duty to refrain from falsely and recklessly impugning the integrity of the Judges depicted in the hypothetical. The Respondent's hypothetical clearly impugns the integrity of the Judges. The Respondent's use of the false and reckless depictions is not justified or substantiated merely because the Respondent identified the statements as hypothetical.

COUNT II: APPLICATION OF RULES TO ANALYSIS OF EVIDENCE AND FINDINGS OF FACT (DETERMINATION OF RULES VIOLATED)

The ODC in Count II alleged a violation of Rules 3.1, 3.3, and 8.2(a) which provide as follows:

Rule 3.1 *Meritorious Clams and Contentions*

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless

do defend the proceeding as to require that every element of the case be established.

Rule 3.3 *Candor Toward the Tribunal*

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Conceal or knowingly fail to disclose that which he is required b law to reveal; however, if a lawyer discovers that his client has perpetrated a fraud on a tribunal, he shall promptly call on his client to rectify same and, if the client shall refuse to do so or be unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in Paragraph (a)(l) and (3) continue to the end of the hearing or proceeding The duties stated in Paragraph (a)(2) and (4) are unlimited in time an dapply, even if compliance requires disclosure of information otherwise protected by Rule 1 .0.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal. of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 8. 2(a) *Judicial and Legal Official*

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

The ODC did not prove by clear and convincing evidence that the Respondent violated Rule 3.1. The committee determined that Rule 3.1 was inapplicable to the inclusion of the hypothetical in the writ application. Clearly, the respondent was arguing for modification or reversal of the law in the writ application. Nearly every Third Circuit Judge identified merit in the Respondent's ultimate argument criticizing the "the official capacity defense."

The ODC proved by clear and convincing evidence that the Respondent made false statements about the Judges of the 15th Judicial District Court in the writ application filed with Third Circuit Court of Appeal in violation of Rule 3.3.

The ODC proved by clear and convincing evidence that the Respondent knowingly made false statements and made statements with reckless disregard concerning the integrity of certain Judges in the 15th Judicial District Court in violation of Rule 8.2(a).

COUNT III: ANALYSIS OF THE EVIDENCE AND FINDINGS OF FACT

In Count III, the ODC contended that the Respondent violated the Rules of Professional Conduct by personally attacking the trial court judge, Judge Anne Simon, in the writ application's Assignment of Error. The Formal Charges contain only an excerpt from the assignment of error, not the entire assignment of error.

The Respondent contended that the Assignment of Error was not a personal attack on Judge Simon, but instead a criticism of the decision made by Judge Simon. The Respondent further contended that a reading of the entire assignment of error showed only an accusation of erroneousness in the denial of the Motion filed by the Respondent in the trial court. Further, the Respondent argued that he was required to find fault with the trial court's decision in order to seek relief in the Third Circuit Court of Appeals.

In reference to Count III, the Committee heard testimony from the trial judge, Judge Anne Simon. The Committee also heard testimony from Judge Thibodeaux, Judge Decuir, and Judge Cooks of the Third Circuit. Finally, the Committee heard the testimony of the Respondent.

The entire Assignment of Error reads as follows:

> "Judge Simon (Judge Ad Hoc) has committed reversible error in the performance of her duties as Judge Ad Hoc. Specifically, Judge Simon utilized the wrong standard (subjective) in deciding this issue. In denying plaintiffs Motion to Disquality/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority, but the very principals

(honesty and fundamental fairness) upon which our judicial system is based. Judge Simon's denial undermines the efficacy of our jurisprudence, attorney ethics and judicial canons and serves no other purpose but to promote public disrepute and distrust of our legal system. Indeed, Judge Simon's denial of plaintiff's motion is baseless and legally, logically and ethically unsound."

Based upon a review of the Assignment of Error in its entirety and based upon the testimony, the Committee made the following findings of fact and made the following conclusions:

1. An Assignment of Error in a writ application must include statements detailing why the trial judge's ruling was erroneous.

2. None of the Third Circuit Court of Appeals Judges found the language in the Assignment of Error to be unethical or to be a personal attack on Judge Simon. There is no allegation by the ODC or anyone at the Third Circuit that the Assignment of Error violated any Uniform Rule of the Appeals Court. Judge Thibodeaux and Judge Cooks both believed that the language in the Assignment of Error was not extraordinary.

3. While Judge Simon considered the Assignment of Error to be inappropriate, she did not file a complaint with ODC, nor did she seek to sanction the Respondent.

4. Read in its entirety, the Assignment of Error could be interpreted as only an attack on the ruling made by Judge Simon, and not a personal attack.

COUNT III: APPLICATION OF RULES TO ANAYSIS OF EVIDENCE AND FINDINGS OF FACT

The ODC in Count III alleged a violation of Rules 8.2 (a) and 8.4 which provide as follows:

Rule 8.2(a) *Judicial and Legal Official*

(A) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4(d) *Misconduct*

It is professional misconduct for a lawyer to:

(d) Engage in conduct that is prejudicial to the administration of justices.

The ODC failed to prove by clear and convincing evidence that the Respondent violated Rule 8.2(a). The Respondent made no statements contained in the Assignment of Error rise to the level of reckless disregard.

The ODC failed to prove by clear and convincing evidence that the Respondent violated Rule 8.4. Considering the unanimous testimony of the Third Circuit Judges that the Assignment was neither unethical nor a violation of any Rule of Court, the Committee could not conclude that the Respondent

engaged in any conduct that was prejudicial to the administration of justice.

ASSESSMENT OF BASELINE SANCTIONS

Louisiana Supreme Court Rule XIX, Section 10(C) states that in imposing a sanction after a finding of lawyer misconduct, the court or board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

2. whether the lawyer acted intentionally, knowingly, or negligently,

3. the amount of actual or potential injury caused by the lawyer's misconduct; and

4. the existence of any aggravating or mitigating factors;

The Louisiana Supreme Court also relies on the ABA *Standards for Imposing Lawyer Sanctions* ("ABA Standards") to determine the baseline sanction.

By violating Rule 3.3 and Rule 8.2(a), the Respondent violated his duties owed to the Judiciary and legal system. There was no evidence of harm to the Respondent's client. The hypothetical certainly had the potential to lessen the public's trust and confidence in the Judiciary. Also, the unnecessary referral to certain judges in a negative context was reckless and offensive. The Judges depicted negatively were offended by the hypothetical. However, Committee could not conclude that injury rose to the level of "serious" as defined in the ABA Standards. The Respondent knew that certain statement contained in the

colloquy were false, but by labeling them as hypothetical, the Respondent did not knowingly or intentionally mislead the court. In assessing sanctions, the Committee also gave great deference to the testimony of the Third Circuit Judges who all stated that the argument present in the writ had merit, and if raised properly, the Third Circuit would have likely recused the Judges of the 15th Judicial District from the *Counselman* case.

Considering the above factors, the applicable ABA Standards provide that a Public Reprimand is the appropriate baseline sanction. Simon's brief caused injury or potential injury. The baseline sanction is to be adjusted in accordance with the presence of aggravating and mitigating factors. The applicable aggravating factors were a prior disciplinary offense and substantial experience in the practice of law. Mitigating factors were the absence of selfish or dishonest motive and full and free disclosure and a cooperative attitude toward the proceedings. The applicable aggravating and mitigating factors do not warrant a deviation from the baseline sanction.

The ODC recommended a sanction of suspension based upon the cases of *Louisiana State Bar Association v. Karst,* 428 So.2d 406 (La. 1983) and *In re Edward J. Larvadain, Jr,* 664 So.2d *395* (La. *1995).* These cases are inapplicable to Simon's conduct and are wholly distinguishable. Both Karst's and Larvadain's conduct was much more aggregious than Simon's. Karst knowingly accused a judge of being "dishonest, corrupt, and engaging in fraud and misconduct." Additionally, Karst had charged the Judge with being blackmailed and bribed. Karst had his unfounded accusations published in a regional newspaper. Lavardain verbally assaulted a Judge, cursed him and accused him of being a racist in an attempt to intimidate the Judge. Simon's conduct in the instant case is not comparable to the conduct of Karst and Lavardain. Accordingly, suspension is not an appropriate sanction.

Although not controlling, the case of *In the Matter of Wilkins,* 782 N.E.2d *985* (Indiana, Feb. 4 *2003)* gives much guidance as to the appropriate sanction to be imposed on Simon. Wilkens made statements and suggestions in an appellate brief impugning the integrity of the appeals Judges by suggesting that they were determined to find against him, regardless of whether the facts or law supported the decision. After initially sanctioning Wilkins with a suspension for thirty days, the Indiana Supreme Court revised the sanction on rehearing to a public reprimand.

Kentucky Bar Association v. Heleringer, 602 S.W.2d 165 (Kentucky 1980) also is persuasive. Heleringer made false and unsubstantiated statements that a trial judge acted in a manner that was "highly unethical and grossly unfair". Heleringer was sanctioned with a public reprimand.

SANCTION RECOMMENDATION

Considering the factual determinations of the Committee, the ABA Standards, and the case law cited, it is the recommendation of the Hearing Committee that the Respondent be publicly reprimanded for impugning the integrity of the Judge's of the 15th Judicial District Court. The Committee further recommends that the Respondent be ordered to attend four hours of professionalism classes for each of the next three years, and be ordered to pay all costs which are related to Count II of the Formal Charges. In the event the Respondent fails to attend the professionalism courses as recommended by the Committee, then he should be suspended. The Committee recommends that Count I and Count III of the Formal Charges be dismissed. This 5th day of March, 2004.

HEARING COMMITTEE #7
David P. Bruchhaus, Chair
Scott Scofield, Lawyer Member
Martin L. Chehotsky, Public Member

APPENDIX - D
SUPREME COURT OF LOUISIANA

NEWS RELEASE #061

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the **29th day of November, 2005,** the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING (S) DENIED:

2003-KA-2418 STATE OF LOUISIANA v. JOHN DALE ALLEN (Parish of Red River) JOHNSON, J., would grant rehearing.

2003-KA-2425 STATE OF LOUISIANA v. GLYNN JUNIORS, JR. (Parish of St. James) CALOGERO, C.J., dissenting. For the reasons stated in my partial dissent from the original majority decision in this case, I dissent from the denial of this application for rehearing. I would grant rehearing and order a new sentencing hearing for the defendant. JOHNSON, J., would grant for reasons previously given. WEINER, J., would grant in part, see reasons attached.

2004-C-1089 MALLARD BAY DRILLING, INC. v. JOHN NEELYKENNEDY, SECRETARY OF DEPARTMENT OF

	REVENUE, STATE OF LOUISIANA (Parish of Iberia) JOHNSON, J., would grant rehearing.
2004-B-2397	IN RE: ROGER W. JORDAN, JR. WEIMER, J., would grant rehearing.
2004-B-2947	IN RE: J. CLEMILLE SIMON CALOGERO, C.J., would grant rehearing. WEIMER, J., would grant rehearing.
2005-CC-0074	BECKY BOUTON STELLUTO v DONALD LOUIS STELLUTO (Parish of Orelans) VICTORY, J., would grant rehearing. TRAYLOR, J., would grant rehearing. WEIMER, J., would grant rehearing.

APPENDIX E

REQUEST FOR REHEARING
DOCKET NO. 2004-B-2947

IN RE: J. CLEMILLE SIMON

ATTORNEY DISCIPLINARY PROCEEDINGS

APPLICATION BY RESPONDENT, J. CLEMILLE SIMON FOR REHEARING

NOW INTO COURT, through undersigned counsel comes J. CLEMILLE SIMON, Respondent, who respectfully urges that the Judgment of this Honorable Court rendered on June 29th, 2005 ordering discipline of J. CLEMILLE SIMON is erroneous and contrary to law and is prejudicial to the Respondent for the following reasons:

I.

Three separate bodies, including this Court, addressed and considered the alleged misconduct of attorney J. Clemille Simon. The. Hearing Committee found a violation on Count II and no violation on Counts I and III and its recommendation was public reprimand. Notably, the Hearing Committee found "demonstrable evidence" that Respondent did not engage in misconduct in seeking Judge Rubin's recusal. The Louisiana Attorney Disciplinary Board found no violations and its recommendation was dismissal of the complaint. Five of the Justices of the Louisiana Supreme Court recommended suspension as a sanction finding respondent guilty of unethical conduct on all three counts. Two Justices (Calogero and Weimer) dissented from the majority and would have imposed public reprimand. Justice Weimer found a violation on Count III only.

Notably, one member of the Disciplinary Board said that "there was clear evidence" of Judge Rubin's misconduct and that

it was "nonsense" to suggest that Respondent had engaged in misconduct stating. further that he was "more shocked" by the judicial behavior than any actions on the part of Respondent. It would seem that if the evidence against Respondent met the standard of "clear and convincing" proof some consensus would have been arrived at. It is felt that the diversion among the opinions and recommendations in this case is evidence that "clear and convincing" evidence is not present here.

II.

Although the Hearing Committee has been characterized by the Louisiana Supreme Court in many of its past decisions as the "eyes and ears" of the Court and although this Court has treated the factual determinations of the Hearing Committee by applying the "manifest error rule, that standard was apparently abandoned by the Court in this case. Clearly, the majority of the Court assigned no weight to the findings and recommendations of either the Hearing Committee or the Disciplinary Board.

III.

For the Court to ignore most of the recommendations of the Hearing Committee and all of the recommendations of the Disciplinary Board without applying or testing these recommendations under the "manifest standard" may make the procedure of hearing and recommendations by the Hearing Committee and by the Disciplinary Board a futile exercise.

IV.

The Louisiana Supreme Court instructs and teaches through the decision it renders. The District Judge sought to be recused first said in open Court that a telephone conference had been held with the attorneys. The District Judge sought to be recused later testified under oath that a conference of the attorneys had occurred. Then, at the disciplinary hearing before the Hearing Committee the District Judge sought to be recused recanted his testimony. The recanted testimony of the Judge followed the testimony of his law clerk and of defense, counsel who was present. These witnesses testified under oath that no such conference occurred. The Judge's inconsistent testimony

was excused by this Court offering that the District Judge was very busy. Notably, this was not a justification provided by the District Judge. Seemingly, the Judge would have been expected to testify if he were not certain of the occurrence of the conference that he was just uncertain.

V.

The Court does not give adequate weight and consideration to the inconsistent sworn testimony of judge Edwin Rubin and, rather, condemns J. Clemille Simon for filing a false and unsupported motion to recuse Judge Rubin. The motion to recuse was reasonably supported by the law and the facts as suggested by the Hearing Committee and by the Board.

VI.

According to prior jurisprudence, the trial judge in *Counselman* should have recused himself on his own motion because he was simultaneously being represented by attorneys who were now before him in opposition to another party. There existed more than ample grounds for the disqualification of opposing counsel who represented the Judge no matter whether such representation was "personal" or in his "official capacity." Special access to the court in any capacity should trigger an appearance of impropriety.

VII.

The hypothetical argument made by Respondent in his brief troubled some but not all of the judicial witnesses who testified at the hearing. One was flattered, another pointed out it was obviously not intended to portray the truth, another recognized it essentially as rhetorical argument which was not intended to offend. By the very definition of the word "hypothetical" absolutely no truth can be assigned. In fact, Webster's dictionary defines the term as "highly conjectural," "not well supported by available evidence." No judge in the hypothetical was portrayed as doing something wrong or something he should not have been doing. The hypothetical was made in the context of pleadings, not in the newspaper. Seemingly, the more important question is whether or not this

hypothetical did in fact expose the "official capacity" defense raised by the defendant in the *Counselman* case as absurd. The hypothetical argument was genuinely intended to point Out the absurdity of the defense, and for no other purpose. Whether or not this Court feels that the use of the hypothetical argument was essential to the arguments is respected, however, at the time the arguments were utilized it was Respondent's serious and genuine belief that he needed to graphically display what he considered to be the absurdity of an argument that divided the judges of the Fifteenth Judicial District Court into official as opposed to unofficial persona. Respondent sought to make the point that the persona of the judges could not be divided and that the access afforded by the judges to their counsel was quite more liberal than the access afforded to others.

VIII.

This Court's finding that the Respondent made "knowingly false statements" about judges by using the hypothetical seems, by very definition of the word "hypothetical" unlikely or impossible.

IX.

A fair reading of the assignment of error regarding the decision of Judge Anne Simon (Count III), is that it was indeed the decision of Judge Simon which was being criticized not the judge who enjoys an excellent reputation in our legal community. Judge Simon's decision in light of the facts was erroneous as measured against prevailing law and jurisprudence. Judicial decisions should be subject to criticism and review. This is the very purpose of our appellate process. Respondent should not be sanctioned for questioning the wisdom of Judge Simon's judicial decision.

X.

This decision of the Court is likely to have a most chilling effect upon members of the Bar. Given that Mr. Simon knew that opposing counsel actually representing the presiding judge at the time of the pending litigation; given that there had been numerous rulings by the trial judge which were reversed by the Appellate

Court; given that hearings on motions were conducted in violation of procedure rules and local rules; given that the Trial Judge made inaccurate statements on the record (See Exhibit A attached), one would ask rhetorically whether or not Mr. Simon should have refrained from considering recusation of the trial judge? What is the perception of Mr. Simon's client? If the case was lost would the client question Mr. Simon's wisdom in not seeking recusation of the judge? Must attorneys be absolutely correct in moving for recusal and forecast whether the appellate courts will agree or disagree with his motion? If the appellate courts disagree with his motion does the moving attorney court discipline? Is the better part of valor to refrain from asking for recusation when such a request may be controversial?

XI,

The record in this case developed before the Hearing Committee reveals that the Respondent advocated vigorously and tirelessly for his client. As to the hypothet, some are offended, most were not. One thing is certain, the argument drove home and exposed the untenable "official capacity" argument being asserted by the defense. It is also important to recall that the version of the brief containing the hypothet was never filed. Rather it was not until published by the Hearing Committee and by the Board and by this Court did it become a public utterance.

WHEREFORE, the premises considered Respondent prays that a rehearing be granted in this appeal and that after due proceedings, the Judgment rendered on June 29th, 2005 be set aside and reversed and that there be judgment by the Louisiana Supreme Court accepting the recommendation of the Louisiana Attorney Disciplinary Board and rejecting Count I, Count II and Count III of the Formal Complaint in this matter.

J. CLEMILLE SIMON

BY:_____

LESLIE J. SCHIFF BAR NO.11776
SCHIFF LAW CORPORATION
P.O. Box 10
Opelousas,LA70571-0010

CERTIFICATE

I herein certify that a copy of the foregoing Application by Respondent for Rehearing and Memorandum has been mailed this day to Charles B. Plattsmier, Chief Disciplinary Counsel and Robert Kennedy, Jr., Deputy Disciplinary Counsel at 4000 S. Sherwood Forest Blvd., Suite 607, Baton Rouge, LA 70816, by placing same in the U.S. Mail, postage prepaid and properly addressed.

Opelousas, Louisiana this 12th day of July, 2005.

_____
LESLIE J. SCHIFF

ORDER

Considering the foregoing Application by the Respondent and the Memorandum in support thereof and being of the opinion that

good cause is shown for granting a rehearing, let the above entitled and numbered cause be fixed for argument on rehearing in this Court on the_____ day of_____, 2005.

New Orleans, Louisiana, this_____day of_____, 2005.

_____

JUSTICE, LOUISIANA SUPREME COURT

SUPREME COURT OF LOUISIANA
DOCKET NO. 2004-B-2947

IN RE: J. CLEMILLE SIMON

ATTORNEY DISCIPLINARY PROCEEDINGS

MEMORANDUM IN SUPPORT OF APPLICATION BY RESPONDENT FOR REHEARING

Respondent urges the Louisiana Supreme Court to reconsider the opinion rendered in these attorney disciplinary proceedings on June 29th, 2005.

As to Counts I, II and III, we are confused by the Court's recitation of standard of review of the recommendations of the Hearing Committee and the Louisiana Attorney Disciplinary Board. In the past it has been held that on factual issues the Louisiana Supreme Court considers the Hearing Committee as its eyes and ears. In the absence of manifest error, the factual findings of the Hearing Committee are accepted. In the discussion commencing at Page 11 of the opinion of this Court, the standard of review is recited as requiring an independent (de novo) review of the record to determine whether the alleged misconduct has been proved by clear and convincing evidence. The Court, at this point in recitation, however, does not mention that the Hearing Committee's factual findings are generally accepted unless found to be manifestly erroneous. The reasoning supporting such a conclusion is that the Court has long considered the Hearing Committee to be its eyes and ears. *In Re Small,* 863 So.2d 500 (La. 2003),In *Re Bolton,* 820 So.2d 548 (La. 2002), *In Re L.D. Sledge, 859* So.2d 617 (La. 2003), *In Re Warner,* 851 So.2d 1029 (La. 2003).

We are concerned that the reliance normally placed upon the findings of the Hearing Committee has not occurred in this

case. The Court has not determined the recommendation of the Hearing Committee or the Board to be erroneous under the manifest error standard. There seems to be a conflict between a de novo/independent review and a standard which requires investigation into whether or not manifest error has been committed. We urge that the recommendations of the Hearing Committee as reflected in its opinion and of the Louisiana Attorney Disciplinary Board as reflected in its opinion are not manifestly erroneous. *In Re Caufield* 683 So.2d 714 (La. 1996), *In Re Pardue,* 633 So.2d 150 (La. 1994).

Rather these recommendations are based upon the Hearing Committee having seen and heard the witnesses over a period of three days in trial. The Hearing Committee Chair and its members questioned the witnesses at length. The Hearing Committee members were able to observe the demeanor of the witnesses. The Hearing Committee was in the best position to evaluate the credibility of Judge Rubin when he was confronted with his earlier statements regarding the telephone conferences (which he said he recalled vividly) with the Respondent and his opponent in comparison with his hearing testimony recanting such a recollection. The standard of independent review, in this case, seem inconsistent with the standard which has previously been pronounced that the Hearing Committee is the eyes and ears of the Court. We would urge that a rehearing should be granted so that the standard of review applied in this case is consistent with the standard of review applied in other cases.

We believe that the Court has not attached the proper significance to the inconsistent testimony of Judge Rubin. From the inception Judge Rubin maintained from the bench and as a witness in his recusation hearing and as a witness in his deposition in the disciplinary proceedings that a pre-hearing conference had been held on the telephone among Judge Rubin and counsel for the parties in the *Simon* case. Respondent has known since the inception that no such conference took place. Nevertheless Judge Rubin persisted in his position until the hearing that the

conference had taken place. He said that he recalled the conference calls "quite vividly" and remembered "very, very well" that the conference call had occurred. This Court in evaluating Judge Rubin's testimony has supplied an explanation for Judge Rubin's inconsistent testimony that Judge Rubin did not supply for himself. Rather, this Court has explained Judge Rubin's testimony on the basis of the fact that he is busy. We do not believe that this is a fair or reasonable interpretation of circumstances. Judge Rubin's testimony was inconsistent on the point of whether or not telephone conferences were conducted as he originally asserted. At the end when he testified before the Hearing Committee he recanted his earlier testimony. In many years of trial we have seen how this Court and other courts have treated inconsistent testimony. It is clear that the testimony of a witness who gives contradictory statements under oath can and should be rejected. It is ironic and wrong that this Court would subscribe falsity to statements made by Respondent while excusing the obviously false testimony tendered by Judge Rubin. We believe that a rehearing should be ordered to correct this anomaly.

We also would ask the Court to give special consideration to the concurring opinion of Board Member Lev Dawson appearing at Page 14 of the Board's recommendation to this Court. As a practicing attorney Mr. Dawson is obviously aware of the difficulties encountered by counsel when a trial judge is not treating the parties before him in a fair and even-handed manner. Mr. Dawson's concurring opinion in this case should not be lost on this Court. During oral argument in this case Justice Johnson queried counsel for Respondent on whether or not we had "open season" on judges. We do not and we should not. On the other hand, there should not be an open season on lawyers. Judges should be expected to conduct themselves and the proceedings to which they are assigned in a fair and impartial manner.

As to Count III the Court has ruled that the assignment of

error of the questioned brief is a personal attack on Judge Simon. This ruling is clearly contrary to the evidence in this case. We would urge the Court to read the testimony of Respondent in this regard. He was a Law Clerk in the Sixteenth Judicial District Court for Judge Fleming and was personally acquainted with Judge Simon when she was on the bench in that jurisdiction. Respondent has great respect for Judge Simon. A fair reading of the assignment of error and the arguments pursuant to the assignment of error is that the decision was being criticized, not the person of the judge. Respondent believes that the parameters and bounds of zealous advocacy should permit harsh criticism of a decision reasonably believed by counsel to be in error. Respondent was being critical of the decision which refused recusation of judges or disqualification of counsel where they had what he perceived to be an obvious conflict of interest because of an attorney/client relationship. This Court has said that such is not permissible.

Finally, this Court has described, as a mitigating factor, Respondent's absence of a dishonest or selfish motive. Respondent appreciates the Court's recognition of his honesty and assures this Court that his efforts in this case were not motivated by anything other than a sincere desire to protect what he perceived to be the endangered rights of his clients. In seems somewhat incongruous that the majority of this Court could find that Respondent has falsified himself in pleadings while, at the same time, recognized the absence of a dishonest or selfish motive.

The Court also indicates as an aggravating factor Respondent's lack of remorse. Throughout these proceedings Respondent has been motivated by a sincere desire to protect the rights and interests of his clients. He has engaged in efforts to recuse judges in the honest and good faith belief that their interests were susceptible to being compromised by other relationships (in the *Counselman* case) and by a series of

perceived, unexplained conduct (in the *Simon* case). Respondent has not been told, until reviewing the decision of this Court that his actions were unethical. Therefore, it could hardly be expected that he would have remorse having been exonerated. When one believes that one has acted appropriately and in good faith without a dishonest or selfish motive, it is difficult, at the same time, that one should be expected to be remorseful. We respectfully suggest that a lack of remorse, as commented upon by the Court in its opinion, is not a valid factor in aggravation.

SUMMARY

It is respectfully requested that this Court order a rehearing for the reconsideration and addressing of the issues mentioned in the accompanying Application.

J. CLEMILLE SIMON

BY:_____

LESLIE J. SCHIFF BAR NO. 11776
SCHIFF LAW CORPORATION
P.O. Box 10
Opelousas, LA 70571-0010

APPENDIX F

MOTION AND ORDER TO RECUSE

SANDRA SIMON, ET AL	15TH JUDICIAL DISTRICT COURT
VERSUS	DOCKET NUMBER: 98-70941-D
CLARENDON NATIONAL INSURANCE COMPANY, ET AL	PARISH OF VERMILION STATE OF LOUISIANA

MOTION AND ORDER TO RECUSE

NOW INTO COURT, through undersigned counsel, comes petitioners, SANDRA SIMON and JOEY SIMON, individually and as natural tutors of their minor children, FELICIA KAYE SIMON and TREVOR DILLON SIMON, who move this Court to recuse the presiding Judge, Judge Edward D. Rubin, from the instant case pursuant to Louisiana Code of Civil Procedure Article 151(B)(5) and request that the presiding Judge immediately recuse himself or refer this matter to another Judge of this Court pursuant to C.C.P. Article 154 and 155, said Motion to Recuse premised upon the following:

1.

Any litigant, whether plaintiff or defendant, is constitutionally guaranteed, among others, the inalienable right of due process. Due process has been defined as "fundamental fairness" (State in interest of A.E., 448 So.2d 183, La. App. 4th Cir. 1984), "equal protection from arbitrary and unreasonable action "(*Babineaux vs. Judiciary Commission,* 341 So.2d 396, La. 1976), "guarantee that **no** person shall be arbitrarily deprived of

his life, liberty or property" (*Babineaux, supra*), as well as a "law which hears before it condemns, which proceeds on inquiry and renders a judgment only after trial" (Black's Law Dictionary, 5th Edition). Essentially, in its most fundamental sense, due process is "the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice."(Black's Law Dictionary, 5th Edition). Most importantly, due process "forbids condemnation without a hearing"(Black's Law Dictionary, 5th Edition).

2.

Pursuant to the Code of Judicial Conduct, Canon I, a Judge is required to uphold the integrity and independence of the judiciary. Specifically, Canon I provides, in pertinent part:

> "An **independent** and **honorable** judiciary is **indispensable** to **justice** in our society. A Judge should participate in establishing, maintaining, and enforcing, and shall personally observe, **high standards of conduct** so that the integrity and independence of the judiciary may be preserved."

3.

The Code of Judicial Conduct, Canon II requires that a Judge avoid impropriety and the appearance of impropriety in all activities. Specifically, Canon II provides, in pertinent part:

"A. A Judge shall **respect and comply** with the **law** and shall act at all times in a manner that promotes **public confidence** in the **integrity and impartiality** of the judiciary."

4.

The Code of Judicial Conduct, Canon III requires that a Judge perform the duties of his office impartially and diligently. Specifically, Canon III provides, in pertinent part:

"A. *Adjudicative Responsibilities*

(1) A Judge shall be **faithful** to the **law** and maintain professional competence in it.

(2) A Judge shall be unswayed by partisan interest, public clamor, or fear of criticism."

5.

The presiding Judge, Judge Edward D. Rubin, has engaged in a pattern of conduct that not only violates that aforementioned Judicial Canons of Ethics but further violates plaintiff's rights of due process and has so engaged in such conduct to the point that Judge Edward D. Rubin is biased and/or prejudiced towards plaintiffs and/or their attorney of record to the extent that Judge Rubin is no longer fair and impartial nor objective in the performance of his judicial responsibilities as relates to plaintiffs.

6.

Among others, some of the most egregious examples of Judge Rubin's bias and prejudice against plaintiffs and his inability to be fair and impartial are as follows.

7.

The law of the State of Louisiana as mandated by the Louisiana Supreme Court in *Independent Fire Insurance Company vs. Sunbeam Corp.*, 99-C-2181, __ So.2d __, is that expert opinion testimony in the form of an affidavit or deposition is admissible in connection with Motions for Summary Judgment. Specifically, the Supreme Court stated:

> "Contrary to the unsettled state of the jurisprudence under our state law, federal courts, which are governed by virtually the same "personal knowledge" requirement as Louisiana Courts, routinely consider expert opinion evidence in affidavits or depositions at the Summary Judgment stage under the factors enumerated in *Daubert vs. Merrell Dow Pharms, Inc.* [citations omitted]

> As stated earlier, because of the similarity between the amendments to Louisiana Code of Civil Procedure Article 966 and Federal Rule of Civil Procedure 56(c), we have also adopted the Federal Court's more liberal standard for summary judgment [citations omitted]. Accordingly, it follows that we now adopt the *Daubert* standards for admissibility of expert opinion evidence at the summary judgment stage, as do the Federal Courts."

The Supreme Court ultimately concluded as follows:

> "Article 967 of the Louisiana Rules of Civil Procedure does **not** preclude from consideration expert opinion testimony in the form of an affidavit or deposition submitted in support of or opposition to a Motion for Summary Judgment."

Notwithstanding the clear and unambiguous Supreme Court mandate, Judge Rubin granted the Defendant's Motion to Strike plaintiffs accident reconstruction expert's affidavit because it contained opinion testimony. Specifically, Judge Rubin stated:

> "Well, the affidavit is what I struck because it contained opinion testimony."

8.

In granting the defendant's Motion to Strike the Court violated the aforementioned Canons of Judicial Conduct to the extent that Judge Rubin did not "respect and comply with the law" nor did Judge Rubin exhibit that he maintained "professional competence" in the law. Such a blatant violation of the law in favor of the defendants and against plaintiffs not only promotes a lack of "competence in the integrity and impartiality of the

[Judge]" but seriously brings into question Judge Rubin's bias and prejudice in favor of the defendants and against plaintiffs. In other words, only a biased and prejudiced Judge lacking impartiality would knowingly violate the law as was done by Judge Rubin in granting the defendant's Motion to Strike plaintiff's expert's affidavit. Judge Rubin was specifically provided with a courtesy copy of *Independent Fire Insurance Company vs. Sunbeam Corp.*, 99-C-2181, __ So.2d __ and chose to ignore it nonetheless.

9.

Not only did Judge Rubin strike plaintiff's accident reconstruction experts affidavit but further exhibited his bias and prejudice and lack of impartiality on a subsequent occasion when the defendants sought to strike plaintiff's expert as a witness altogether. Specifically, the defendants filed, among others, a Motion to Strike plaintiff's expert as a witness. The defendant's motions were not served upon plaintiff's undersigned counsel's office until Friday, July 21, 2000 yet were set for hearing on Monday, July 24, 2000. Service was made upon plaintiff's undersigned counsel's office when plaintiff's undersigned counsel was out of the state. Outside counsel (Wayne Ussery) was retained to cover various plaintiff's motions set for hearing on July 24, 2000 and which had been set for several weeks. Mr. Ussery had no knowledge of the facts of this litigation, the issues involved, much less this cases procedural history. Mr. Ussery's knowledge was limited to those matters which formed the basis of plaintiff's motions. Needless to say, Mr. Ussery had no knowledge of the defendant's motion served upon plaintiff's undersigned counsel's office only one-half (½) working day before the scheduled hearing. In this regard, Mr. Ussery advised the Court as follows:

> "Wayne Ussery, on behalf of Cle Simon, on behalf of the plaintiffs. Your Honor, I was prepared to argue the three (3) plaintiff's motions. And my understanding- I am not even aware. Are the

other two (2) matters before the Court today that Mr. Corry is referring to?"

Notwithstanding that this fact was made known to Judge Rubin and an objection lodged opposing any hearing on the defendant's motions because of a lack of due process, Judge Rubin nevertheless ordered that the matters would be heard. Specifically, Judge Rubin stated:

> "Alright, Gentlemen, I am going to note your objections for the record. Both of you are well familiar with this case and with the facts of this case and what the issues are and procedurally what each others position is. So, we are going to proceed."

Astonishingly, Judge Rubin struck plaintiff's expert as a witness and for no articulated reason. In so doing Judge Rubin again displayed his bias and prejudice against plaintiffs and/or their counsel and in favor of defendants and his lack of impartiality. Equally, Judge Rubin demonstrated, again, his willingness to violate the aforementioned Canons of Judicial Conduct. Supervisory relief was requested and obtained from the 3rd Circuit Court of Appeal wherein the 3rd Circuit reversed and set aside Judge Rubin's ruling. However, of even greater significance was Judge Rubin's willingness to knowingly misstate the truth. Specifically, when Judge Rubin stated that "both of you are well familiar with this case and with the facts of this case and what the issues are and procedurally what each others position is" he knew such a statement was patently false. Mr. Ussery had never made an appearance before Judge Rubin in this case nor was Mr. Ussery an attorney of record. Mr. Ussery clearly stated that he was prepared to argue only plaintiff's motions and objected to any additional matters being heard. Judge Rubin's willingness to go on record and state that which was patently false underscores Judge Rubin's bias and prejudice against plaintiffs and/or their

counsel and underscores his lack of impartiality not to mention Judge Rubin's willingness to violate the aforementioned Canons of Judicial Conduct.

10.

Judge Rubin further demonstrated his disrespect for the law and his refusal to comply with the law in direct derogation of the aforementioned Canons of Judicial Conduct which, again, underscored his bias and prejudice against plaintiffs and in favor of the defendants and his lack of impartiality when he refused to grant plaintiff's Motion in Limine regarding whether or not plaintiffs were utilizing their seatbelts when this accident occurred. Specifically, pursuant to R.S. 32:295.1 plaintiffs moved the Court for an *in limini* order prohibiting the defendants from making any reference to whether or not plaintiffs were wearing their seatbelts. R.S. 32:295.1 provides, in pertinent part:

> "In any action to recover damages arising out of the ownership, common maintenance, or operation of a motor vehicle, failure to wear a seatbelt in violation of this section shall **not** be considered evidence of comparative negligence. Failure to wear a seatbelt in violation of this section shall **not** be admitted to mitigate damages."

Notwithstanding the clear and unambiguous language of R.S. 32:295.1 and the jurisprudence that seatbelt usage is not admissible, Judge Rubin ruled that the defendants could question plaintiffs about their usage of seatbelts for impeachment purposes. In so doing, Judge Rubin again displayed his disrespect for the law and his refusal to comply with the law in direct derogation of the aforementioned Canons of Judicial Conduct which, again, underscored his bias and prejudice towards plaintiffs and/or their attorney of record and in favor of the defendants. Supervisory relief was requested and obtained from the 3rd Circuit Court of Appeal wherein the 3rd Circuit reversed and set aside Judge

Rubin's ruling.

11.

Judge Rubin further demonstrated his lack of impartiality and his bias and prejudice against plaintiffs and/or plaintiff's counsel and in favor of the defendants in connection with an attempt by plaintiffs to have the Court enforce the Court's standing Pre-Trial Order/Scheduling Order. Specifically, this case was prematurely set for trial initially on August 21, 2000. The Scheduling Order in effect at the time provided that discovery was to be completed by July 24, 2000 (30 days before trial). This fact notwithstanding, the defendants continued to engage in discovery well beyond the discovery cut off date including the unilateral scheduling of plaintiff's supplemental depositions only seven (7) working days prior to trial as well as other depositions as late as four (4) working days prior to trial. (Judge Rubin's willingness to allow the supplemental depositions of plaintiffs only seven (7) working days before trial coupled with Judge Rubin's previous refusal to force production of surveillance videos until subsequent to plaintiff's supplemental depositions is a separate issue which will be discussed hereafter). Plaintiffs sought to quash all depositions beyond the discovery cutoff date. Pursuant to conference call on August 8, 2000 the Trial Court refused to enforce the standing Pre-Trial Order/Scheduling Order and denied plaintiff's Motion to Quash.

12.

The theory behind pre-trial procedure is the **orderly** disposition of a case and to avoid surprise. *State in interest of Babineaux*, 567 So.2d 693 (La. App. 3rd Cir. 1990), *Martin vs. Hertz Corporation,* 533 So.2d 1365 (La. App. 3rd Cir. 1988), writ denied 535 So.2d 746 (La.1989). The Trial Judge has discretion to modify the pretrial order, **but** that discretion is necessarily **controlled** by the **principle** that it must be exercised to **prevent substantial injustice** to the parties who have relied on the pretrial rulings or agreements and structured the preparation and presentation of their cases accordingly. *State in interest of Babinea et ux, supra, Martin, supra.*

13.

Notwithstanding the well reasoned law regarding pretrial procedure and the obligation imposed upon Judge Rubin by the aforementioned Canons of Judicial Conduct. Considerations and notions of fair play should have dictated that Judge Rubin quash the depositions noticed by the defendants in violation of the Pretrial Order especially plaintiff's supplemental depositions only seven (7) days before trial. The fact that Judge Rubin did not demonstrates his lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or their counsel and in favor of the defendants. In other words, only a biased and prejudiced Judge lacking impartiality would join hands with the defendants in violating the Scheduling Order especially considering the prejudicial effect to be suffered by the plaintiffs in being deprived of possession of surveillance videos until after their supplemental depositions which were scheduled to occur only seven (7) days before trial. In other words, if the Trial Court's discretion is controlled by principles that it must be exercised to prevent "substantial injustice" one would think that a Judge would err on the side of caution and abide with a pretrial order considering that no reason existed to violate the pretrial order other than defendant's desire to do so and prolong production of the surveillance tapes. If the pretrial order serves no valid purpose or can be freely ignored to the point that it serves no valid purpose, why have a pretrial order?

14.

Judge Rubin's lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or plaintiff's counsel and in favor of the defendants again surfaced in connection with the defendant's repeat performance, once the trial was continued and reset, in again scheduling plaintiff's supplemental depositions only five (5) working days before trial. Specifically, trial of the matter was continued from the August 21, 2000 setting due to health concerns of plaintiffs and again prematurely reset for October 30, 2000. The defendants unilaterally canceled plaintiff's supplemental depositions as previously scheduled and unilaterally

rescheduled plaintiff's supplemental depositions for October 20, 2000. In response, plaintiffs filed a Motion to Enforce Pretrial Order and/or Establish Discovery Deadlines. Judge Rubin again demonstrated his lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or plaintiff's counsel and in favor of the defendants. Specifically, notwithstanding the clear intent of the defendants to forego production of surveillance videos until the 11th hour and notwithstanding the well reasoned law regarding pretrial procedure, Judge Rubin not only denied plaintiff's Motion to Enforce Pretrial Order and/or Establish Discovery Deadlines, *ex parte*, and thus refused to set plaintiff's motion for hearing, but embarked upon a course of conduct designed solely to misrepresent the truth. Specifically, pursuant to minute entry dated September 18, 2000 the Court stated:

> ".....Failure of plaintiffs-deponents to comply with this Order will subject them and their counsel to close scrutiny which may result in further Orders from this Court.
>
> This Court finds that both sides have engaged in practices beyond our normal scheduling order, and that neither side has been prejudiced thereby. Since this Court, in its discretion, has consistently afforded both sides the same consideration of latitude and leniency where scheduling is concerned, the Court is unimpressed with arguments seeking now to impel enforcement of deadlines imposed by the Scheduling Order. Therefore, ALL depositions scheduled as of the date of this minute entry will proceed as scheduled."

When Judge Rubin stated that "both sides have engaged in practices beyond our normal scheduling order" and that the Court had "consistently afforded both sides the same consideration of

latitude and leniency where scheduling is concerned" Judge Rubin knew that any such statements were patently false. Judge Rubin's willingness to go on record and state that which he knows to be false not only underscores his lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or their counsel but seriously brings into question not only Judge Rubin's motivation in embarking upon his mission of documenting untruths but further his judicial integrity. Point of fact, plaintiffs have never requested latitude or leniency beyond the Scheduling Order. Any such statement flies in the face of the truth and the fact that plaintiffs, alone, have repeatedly tried, in vain, to have the Court enforce the Court's Pretrial Order/Scheduling Order. The Trial Court's statement that "failure of plaintiffs-deponents to comply with this Order shall subject them and their counsel to close scrutiny which may result in further Orders from this Court" represents nothing but a poorly veiled attempt to threaten and intimidate plaintiffs and/or their counsel into submission and again demonstrates Judge Rubin's lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or their counsel. To make matters worse, without any authority to do so, Judge Rubin denied plaintiff's Motion, *ex parte*. Constitutional due process mandates that petitioners be afforded an opportunity to be heard in connection with any motion filed with the Court and to present evidence in support of any such motion. Equally, C.C.P. Article 963 mandates that contradictory motions be set for hearing. Specifically, Article 963 provides that a Trial Court can either **grant** the motion, *ex parte*, or set the matter for contradictory hearing. Article 963 does not authorize a Trial Court to deny and/or refuse to set a contradictory matter for hearing and on an *ex parte* basis. Specifically, Article 963 provides:

> ".....If the Order applied for by written motion is one to which mover is clearly entitled without supporting proof, the Court may grant the Order *ex parte* and without hearing the adverse parties.

If the Order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion **shall** be served on and tried contradictorily with the adverse party.

The Rule to Show Cause is a contradictory motion."

Thus, the Trial Court not only embarked upon a campaign of misrepresenting the truth, the Court also engaged itself in an arbitrary and callous effort to trample upon plaintiff's constitutional right of procedural due process by refusing to even set plaintiff's contradictory motion for hearing. Only a biased and prejudiced Judge lacking impartiality would engage in such reckless and abusive conduct.

Equally disturbing is Judge Rubin's gratuitous commentary that "neither side has been prejudiced" by his refusal to enforce the pretrial order. Either Judge Rubin is biased and prejudiced and lacks impartiality or he is so out of touch with reality that the making of that statement alone requires his recusal. Again, the theory behind pretrial procedure is the orderly disposition of a case and to avoid surprise. The discretion afforded a Trial Court to modify the Pretrial Order is controlled by the principle that the discretion must be exercised to prevent substantial injustice. The only party to this litigation that has chosen to perpetually violate the Pretrial Orders are the defendants. In violation of the initial pretrial order requiring that discovery be completed four (4) weeks in advance of trial the defendants engaged in discovery to the extent that no less than six (6) Notices of Deposition were filed including those specifically mentioned herein. Whereas,

in connection with the current trial setting and the Pre-Trial Order which prohibits discovery beyond four (4) weeks in advance of trial the defendants have filed no less than twelve (12) Notices of Deposition including plaintiff's supplemental depositions. The most egregious example of the defendant's violation of the Pretrial Order is the arbitrary and unilateral scheduling of plaintiff's supplemental depositions on two (2) separate occasions, merely seven (7) and five (5) working days prior to trial. This conduct has repeatedly been engaged in by the defendants with the sole objective of depriving plaintiffs of possession of the surveillance videos until the 11th hour. Judge Rubin has repeatedly ignored plaintiff's pleas for Judge Rubin's intervention. Judge Rubin, notwithstanding the law regarding pretrial procedure, opted rather to exercise his discretion in a manner solely designed to promote surprise and trial by ambush as well as promote substantial injustice as opposed to the equitable principles of avoiding surprise and preventing substantial injustice. Yet, Judge Rubin's lack of objectivity and lack of impartiality is so deep seeded that he feels comfortable stating that "neither side has been prejudiced thereby".

15.

Judge Rubin again demonstrated his lack of impartiality and his affirmative bias and prejudice against plaintiffs not to mention his willingness to violate the aforementioned Judicial Canons of Ethics in connection with plaintiff's filing of a Motion to Traverse Certificate of Readiness and for Sanctions. Specifically, pursuant to Local Rule 20 a litigant was prohibited from setting a case for trial prior to completion of all discovery. Specifically, Local Rule 20 provided, in pertinent part:

"Attorneys may be penalized for fixing a civil case prior to completion of all discovery. If the

> matter is not ready to be placed on the trial docket, and a party certifies that it is, that party shall not be heard to complain that the matter is not ready. The party who choses to traverse a certificate of readiness, upon showing discovery is not complete, may be awarded costs and attorneys fees for pursuit of the rule."

Plaintiff's Motion to Traverse Certificate of Readiness and for Sanctions was filed with the Vermilion Parish Clerk of Court's office and was accompanied by a Show Cause Order. Judge Rubin, as before, wrote denied on the show cause order thus refusing to set this matter for hearing and thus effectively denying plaintiff's Motion to Traverse Certificate of Readiness for Trial and in the process deprived petitioners of their procedural due process and equal protection insofar as they were deprived of the opportunity to be heard meaningfully by the Court as well as the opportunity to introduce evidence in support of their motion. The documentation attached to plaintiff's motion clearly demonstrated that the defendants engaged in the bulk of discovery subsequent to having made the certification that discovery was complete and continued to engage in discovery up to within four (4) days of trial. In fact, to this day defendants continue to engage in discovery. Notwithstanding that plaintiff's motion should have been granted, *ex parte*, Judge Rubin exceeded his authority and again demonstrated his lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or their counsel by arbitrarily denying their motion *ex parte*. In other words, only a biased and prejudiced Judge lacking impartiality would engage in such abusive and arbitrary conduct.

Supervisory relief has been requested from the 3rd Circuit Court of Appeal and plaintiffs are awaiting a ruling.

16.

Judge Rubin again demonstrated his lack of impartiality and his affirmative bias and prejudice against plaintiffs and/or

their counsel in connection with plaintiffs filing of a Motion for Order Compelling Discovery. Specifically, in the course of the defendant's deposition the defendant was instructed by his counsel of record not to answer questions concerning what the defendant told the insurance adjustor. Essentially, defense counsel created a privilege heretofore unheard of. Specifically, defense counsel sought to prevent plaintiffs from inquiring of the defendant, conversations had between the defendant and the insurance adjustor based upon some sort of insured/insurer privilege. In filing the Motion to Compel plaintiffs requested expedited consideration considering the impending trial date. Judge Rubin's lack of impartiality and bias and prejudice against plaintiffs and/or their counsel again surfaced when Judge Rubin, for no articulated reason, refused to schedule plaintiff's Motion for Order Compelling Discovery for Expedited Consideration and merely set plaintiff's Motion Compelling Discovery for hearing on the day of trial. At the time plaintiffs filed the Motion to Compel Writs had already been applied to the 3rd Circuit Court of Appeal because of Judge Rubin's previous refusal to set plaintiff's motions for hearing. Scheduling plaintiff's Motion to Compel for hearing on the day of trial was apparently Judge Rubin's way of retaliating against plaintiffs and/or their counsel. In so doing, Judge Rubin has effectively deprived plaintiffs of due process to the extent that they have no meaningful remedy assuming the motion is granted. In other words, one must assume, although with Judge Rubin not safely, that such a motion would be granted considering the nature of the frivolous objection. That being the case, there is very little that can occur on the day of trial and thus Judge Rubin has effectively deprived the plaintiffs of a remedy. In so doing Judge Rubin has deprived plaintiffs of their procedural due process as well as equal protection of the laws. Judge Rubin's perpetual conduct in trampling upon plaintiff's procedural due process rights clearly demonstrates a Judge that lacks impartiality and possesses a particular bias and prejudice which warrants Judge Rubin's recusal.

17.

Perhaps the most egregious example of Judge Rubin's bias and prejudice and lack of impartiality is the refusal by Judge Rubin to follow the mandates of the Louisiana Supreme Court and intervene in connection with the arbitrary and unilateral scheduling of plaintiff's supplemental depositions by the defendants on the two (2) aforementioned occasions. As previously noted, the defendants unilaterally scheduled plaintiff's supplemental depositions to occur only seven (7) and five (5) working days prior to trial (Pretrial Order requires completion of discovery 30 days before trial). Specifically, when this case was originally set for trial on August 21, 2000 the defendants unilaterally scheduled plaintiff's supplemental depositions to occur only seven (7) days prior to trial. Once the case was continued from its setting on August 21, 2000 the defendants unilaterally canceled plaintiff's supplemental depositions as scheduled and unilaterally rescheduled same to occur only five (5) working days prior to the new trial date of October 30, 2000. As previously noted, plaintiffs attempted to obtain Judge Rubin's intervention but to no avail. The defendants conduct in setting the depositions as aforementioned not only violated the pretrial order but was highly prejudicial to plaintiffs to the extent that Judge Rubin had previously ruled that the defendants did not have to produce surveillance videotapes of plaintiffs until subsequent to plaintiff's supplemental depositions. Judge Rubin's conduct in connection with the scheduling of plaintiff's supplemental depositions and his continued refusal to intervene clearly demonstrates a lack of impartiality and a bias and prejudice towards plaintiffs and/or their counsel especially considering the Supreme Court mandate in *Wolford vs. Joellen Smith Psychiatric Hospital*, 693 So.2d 1164 (La. 1997). Therein, the Supreme Court specifically stated that:

> "...We recognize that surveillance videotape may **not** be totally **reliable**, that it may be taken out of context, and that it is **vulnerable** to **manipulation**

through editing techniques. For these reasons, we **emphasize** that although the production of surveillance videotape is to be delayed until after the plaintiff's deposition, the **plaintiff is entitled to the videotape a reasonable time before trial, so as to give the plaintiff ample time to determine any weakness in the videotape. Our rule thus balances the defendants need to preserve valuable potential impeachment evidence for use during cross examination and the plaintiff's need to determine whether the videotape is authentic or misleading."**

Notwithstanding plaintiff's repeated attempts to obtain Judge Rubin's intervention, Judge Rubin refused to require that the defendants not only abide by the pretrial order but otherwise schedule plaintiff's supplemental depositions so as to afford plaintiffs a reasonable time necessary to have the tapes professionally analyzed and engage in whatever discovery (i.e. investigator deposition, etc.) needed to determine the tapes authenticity and whether or not the tape had been manipulated. It is necessary to emphasize that at all times material Judge Rubin was aware of *Wolford,* supra, and the Supreme Court mandate.

Notwithstanding all of the reasons that existed which required Judge Rubin's intervention, Judge Rubin refused to require that the defendants abide by the pretrial order and otherwise facilitate the prompt scheduling of plaintiff's supplemental depositions so as to allow plaintiffs a reasonable opportunity to analyze the surveillance videotapes. In other words, only a biased and prejudiced Judge lacking impartiality would subject litigants to such arbitrary and capricious conduct. Essentially, Judge Rubin's bias and prejudice and lack of impartiality allowed him to engage in conduct which served only to promote surprise and trial by ambush and promoted substantial injustice.

It is an axiomatic rule of law that the primary objective of damage awards is to restore the injured victim in as near a fashion as possible to the state the party was in at the time immediately preceding the injury. In other words, the purpose of damage awards is to "make the victim whole". As previously noted, trial of this matter has been prematurely scheduled, over plaintiff's objections, for October 30, 2000. At the time Judge Rubin scheduled this trial it had been represented to him that plaintiff, Joey Simon, had just undergone a lumbar fusion and that plaintiff, Sandra Simon, who had previously undergone four (4) surgical procedures including a cervical fusion, was, in all probability, going to undergo yet another surgical procedure in the nature of a three (3) level lumbar fusion. It was represented to Judge Rubin that the setting of this case was premature, that plaintiffs would be prejudiced in being forced to trial before the entirety of their medical problems had been diagnosed and remedied and that the Court's action in prematurely setting this case for trial would deprive plaintiffs of their right to recover all damages owed to them. Judge Rubin again exhibited his lack of impartiality and bias and prejudice against plaintiffs and ordered trial to be set for October 30, 2000, the above representations notwithstanding, and notwithstanding that alternative dates were available in early 2001 including January, 2001. The jurisprudence has held that it is not an abuse of discretion to postpone a trial to allow time for a litigant to recover from surgery and allow the parties an opportunity to obtain medical assessment of whether surgery was successful or not in relieving patient's problem which serves the additional benefit of preventing a litigant's testimony to be more understandable at trial. *Morrison vs. Johnson,* 571 So.2d 781 (La. App. 2nd Cir. 1990), writ denied, 575 So.2d 367. The Courts have further held a denial on a Motion to Continuance sought on the grounds of illness of a plaintiff did constitute an abuse of discretion notwithstanding that litigation had been instituted some three (3) years earlier. *Sauce vs. Bussell,* 298 So.2d 832 (La. 1974). It has only been plaintiff's desire to obtain that which they

are entitled to as a result of the defendant's negligent conduct. There is no guarantee that Joey Simon's fusion will ultimately be successful nor is there any guarantee that the three (3) level fusion to be performed on Sandra Simon will be successful, much less that no future surgeries will not be needed. Both require and/or will require physical therapy, the extent to which is yet unknown. In the event that neither of the surgeries are unsuccessful or that future surgeries are required, a fact which is yet unknown, because of Judge Rubin's arbitrary conduct in forcing this case to trial prematurely, he has effectively deprived the plaintiffs of their ability to recover all damages to which they are entitled. Only a biased and prejudiced Judge lacking impartiality would err on the side of forcing a litigant to trial prematurely and preventing a litigant from recovering all damages to which they would otherwise be entitled.

19.

The aforementioned conduct of Judge Rubin instances a pattern of bias and prejudicial behavior completely lacking of any impartiality whatsoever. There is no other rational or logical explanation for Judge Rubin's conduct in trampling upon plaintiff's rights of due process, in making knowing false statements and threats to plaintiffs and/or their undersigned counsel much less the other prejudicial conduct complained of herein. Clearly, the aforementioned instances of judicial misconduct demonstrate judicial impropriety sufficient to warrant Judge Rubin's recusal from this case.

WHEREFORE, Plaintiffs, SANDRA SIMON and JOEY SIMON, individually and as natural tutors of their minor children, FELICIA KAYE SIMON and TREVOR DILLON SIMON, respectfully pray that their Motion to Recuse be granted and that Judge Edward D. Rubin be recused as a presiding Judge over this matter. Plaintiff further prays for an Order of this Court requiring that Judge Edward D. Rubin make himself available for purposes of obtaining sworn testimony by way of deposition within ten (10) from the day the Order is signed.

Plaintiffs further pray that the audiotape of all relevant in Court proceedings be made a part of the record at the Hearing on the instant Motion to Recuse Judge Edward D. Rubin.

AND FOR ALL GENERAL AND EQUITABLE RELIEF.

Respectfully submitted:
J. CLEMILLE SIMON, LTD.
By:

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APPENDIX G

WRIT APPLICATION CONTAINING HYPOTHET AND ASSIGNMENT OF ERROR

THIRD CIRCUIT COURT OF APPEAL
DOCKET NUMBER:

LESLIE WILLIAMS COUNSELMAN
VERSUS
PROGRESSIVE INSURANCE COMPANY,
KOREY W. ALLEMAN, and
UNITED SERVICES AUTOMOBILE ASSOCIATION

ON APPLICATION FOR

EMERGENCY SUPERVISORY WRIT PRIORITY CONSIDERATION AND STAY ORDER REQUESTED

FIFTEENTH JUDICIAL DISTRICT COURT FOR THE
PARISH OF LAFAYETTE, LOUISIANA
DOCKET NUMBER: 2000-5554-D
HONORABLE ANNE LENNAN SIMON, Presiding Judge *Ad Hoc*

ORIGINAL EMERGENCY APPLICATION FOR SUPERVISORY WRIT, REQUEST FOR PRIORITY CONSIDERATION AND STAY ORDER

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REQUEST FOR PRIORITY CONSIDERATION AND STAY ORDER

Priority consideration and a Stay Order is requested. In this regard, Judge Anne Lennan Simon (Judge *Ad Hoc* appointed by the Louisiana Supreme Court) has denied petitioner's Motion to Recuse/Disqualify Defense Counsel notwithstanding the existence of a personal and confidential attorney/client relationship between defense counsel, defense counsel's firm and all of the judges that comprise the Fifteenth Judicial District Court.

Notwithstanding that the Louisiana Supreme Court has granted writs and remanded petitioner's Motion to Disqualify defense counsel for evidentiary hearing and imposed a stay order on all proceedings, defense counsel has seized upon the erroneous ruling of Judge Simon (Judge *Ad Hoc*) wherein Judge Simon has denied petitioner's Motion to Recuse/Disqualify Defense Counsel and his firm. Specifically, defense counsel has hurriedly rushed to the court house and petitioned the court to expeditiously set various motions for hearing and has most recently requested that the case be set for trial. In this regard, hearings have been set for January 7, 2002 and a motion to set

this case for trial was just filed on December 5, 2001. Defense counsel's request for the hearings and the trial is preceded by full knowledge of the fact that appellate review by the Third Circuit Court of Appeal and/or Supreme Court was looming in the future. It is respectfully submitted that the issues involved in the instant matter are of such a grave and serious nature that the Supreme Court Justices, in their combined wisdom, understood the seriousness of the situation and imposed a stay pending resolution of the issues. It is respectfully submitted that defense counsel's rush to trial is an attempt to exploit Judge Simons' erroneous ruling and obtain a conclusion to this case before the Third Circuit Court of Appeal and/or the Supreme Court could have an opportunity to review Judge Simon's ruling. Ultimately, it is defense counsel's hope and desire to have this case concluded before a judge who happens to be his client in hopes of obtaining a favorable ruling on behalf of his client and adverse to petitioner.

Because of the gravity of the situation coupled with the fact that the instant litigation is ongoing with matters currently pending and a trial date looming, it is respectfully submitted that petitioner will suffer irreparable injury as a result of the substantial injustice that has been thrust upon her. Accordingly, expedited consideration and a stay order is requested.

STATEMENT OF JURISDICTION

The supervisory jurisdiction of this Honorable Court has been invoked pursuant to Article 5, Section 10, of the Louisiana Constitution of 1974 and pursuant to Article 2201 of the Louisiana Code of Civil Procedure.

ISSUES AND QUESTIONS OF LAW

The issues presented include the following:

1. May an attorney and his firm who enjoy an intimate, personal and confidential attorney/client relationship with the judges of the Fifteenth Judicial District Court participate in the litigation pending before the very judges who are his clients?

2. What effect, if any, do the Rules of Professional Conduct and the Judicial Canons of Ethics have upon an attorney/client relationship between the presiding judge and defense counsel? Or, may the Rules of Professional Conduct and Judicial Canons of Ethics be discarded and ignored?

3. Is it appropriate for judges to hire local legal counsel as their personal attorneys when said local counsel appears before them in connection with other litigation, notwithstanding the availability of counsel outside the local jurisdiction not to mention the Attorney General's office whose primary function is to act in the capacity of the State and all elected officials?

4. What is the standard to be applied? Subjective? Objective?

ASSIGNMENT OF ERROR

Judge Simon (Judge *Ad Hoc*) has committed reversible error in the performance of her duties as Judge *Ad Hoc*. Specifically, Judge Simon utilized the wrong standard (subjective) in deciding this issue. In denying plaintiff's Motion to Disqualify/Recuse Defense Counsel, Judge Simon has violated not only controlling legal authority but the very principals (honesty and fundamental fairness) upon which our judicial system is based. Judge Simon's denial undermines the efficacy of our jurisprudence, attorney ethics and judicial canons and serves no other purpose but to promote public disrepute and

distrust of our legal system. Indeed, Judge Simon's denial of plaintiff's motion is baseless and legally, logically and ethically unsound.

STATEMENT OF THE CASE

This case involves a garden-variety automobile accident wherein petitioner sustained physical injuries and damages. Suit was filed against the tortfeasor and his insurer and petitioner's UM insurer. A settlement was reached with the tortfeasor and his insurer and thus, the only claims remaining are those as relate to the UM insurer. Defense counsel (Patrick J. Briney) and his firm (Briney & Foret) were retained and have enrolled as defense counsel on behalf of plaintiff's UM insurer (USAA).

During the course of this litigation, it was learned that the Judges of the 15th Judicial District Court had hired defense counsel (Briney and his firm) as the Judges' personal attorneys and that Briney and his firm enrolled as attorneys of record and appeared in Open Court as attorneys of record to defend the Judges of the 15th Judicial District Court in the matter entitled *State v. Cavazos,* Docket No. 87234, pending in Lafayette Parish. Specifically, as noted in the Motion to Recuse in the *State v. Cavazos* matter, the defendant therein had asserted that the Judges of the 15th Judicial District Court had a pecuniary interest in the matter and that the Judges had engaged in conduct in violation of both the Louisiana and U.S. Constitution which warranted their recusal. Briney and his firm have filed pleadings in the *State v. Cavazos* matter, including opposing a Writ Application to the Third Circuit Court of Appeal and the Louisiana Supreme Court and continue to represent said Judges to this very day. Because of the obvious conflict created by virtue of the attorney/client **relationship** between the Judges of the 15th Judicial District Court and defense counsel and his firm, a Motion to Disqualify Defense Counsel from this case and Recuse the Judges of the 15th Judicial District Court from

presiding over the hearing to disqualify defense counsel, was filed with the Court on June 15, 2001. (Exhibit 1). Petitioner's Motion to Disqualify Defense Counsel and Recuse the Judges of the 15th Judicial District Court was denied, *ex parte,* by the Trial Court. An Emergency Writ Application and Request for Stay Order was filed in this Court on or about July 20, 2001 (Third Circuit Docket No. 01 00937-CW). On August 10, 2001 petitioner's Emergency Writ Application and Request for Stay Order was denied by the Third Circuit Court of Appeal by a two-to-one decision.

A simultaneous Emergency Writ Application and Request for Stay Order was also filed with the Louisiana Supreme Court on the morning of August 10, 2001, and prior to the Third Circuit Court of Appeal's denial. (Supreme Court Docket No. 2001-CD-2335). The Supreme Court granted petitioner's Writ Application, reversed and appointed a Judge *Ad Hoc* (Judge Anne Lennan Simon) to conduct an evidentiary hearing as related to petitioner's Motion to Disqualify Defense Counsel.

Pursuant to the Status Conference on September 1, 2001, Judge Simon entered a Minute Entry compelling the taking of defense counsel's deposition which was to cover the nature and scope of defense counsel's representation of the Judges of the 15th Judicial District Court in the *State v. Cavazos* matter, as well as questions concerning the issue of compensation for services rendered (Exhibit 2). It was agreed, however, between counsel that petitioner's undersigned counsel would allow Briney the opportunity to submit, in writing, all pertinent information and perhaps alleviate the necessity of Briney having to sit for a deposition. Pursuant to correspondence dated September 13, 2001, Briney disclosed only the fact that he was charging $150 per hour for his professional time, $100 for his associates' time, and $50 per hour for paralegals (Exhibit 3). No further information was provided. Indeed, Briney refused to answer any

further questions, asserting the attorney/client privilege.

On October 5, 2001, petitioner filed a Motion to Compel Discovery against Briney (Exhibit 4). A hearing was conducted as to petitioner's Motion to Compel Discovery on October 23, 2001, at which time Judge Simon reversed her previous minute entry and **denied** petitioner's Motion to Compel for the reasons as set forth in the transcript of the hearing and the Court's Written Reasons (Transcript of hearing and Court's Written Reasons dated October 24, 2001 attached as Exhibit 5 and 6, respectively).

A hearing on plaintiff's Motion to Disqualify was held on November 5, 2001 at which time Judge Simon employed the wrong standard of review and erroneously denied plaintiff's Motion for the reason as set forth in the transcript of said hearing and court's written reasons (Exhibit 7 and 8, respectively).

LAW AND ARGUMENT

It is an axiomatic and fundamental principle that our system of ordered liberty and justice require adherence to the constitutional principles of equal protection of the laws and due process of law. It is equally self evident that in order for such principles to even exist the judiciary must, at all times, remain independent from the lawyer's bar and faithful to the law and always uphold the integrity and impartiality of the judiciary.

The Code of Judicial Conduct, Canon I, provides that "an **independent** and **honorable judiciary** is **indispensable** to **justice** in our society." It requires that a Judge "should participate in establishing, maintaining and enforcing, and shall personally observe, **high standards** of conduct so that the **integrity** and **independence** of the **judiciary** may be **preserved**" and that "the provisions of this Code are to be **construed** and **applied** to **further** that **objective**." The Code of Judicial

Conduct, Canon II, **mandates** that a "Judge shall **respect** and **comply** with the **law** and shall **act** at **all times** in a **manner** that **promotes public confidence** in the **integrity** and **impartiality** of the **judiciary**" and that a "Judge **shall not** allow family, **social**, **political** or **other relationships** to **influence judicial conduct** or **judgment**" and further provides that "a Judge **shall not** lend the **prestige** of judicial **office** to **advance** the **private interest** of the Judge or **others**; **nor** shall a Judge convey or **permit** others to **convey** the **impression** that they are in a **special position** to **influence** the **Judge**." Canon III mandates that a "Judge shall be faithful to the law and maintain professional competence in it," and that a "Judge shall perform judicial duties without bias or prejudice" and that a "Judge shall dispose of all judicial matters promptly, efficiently and fairly." Moreover, Canon III mandates that a "Judge **shall disqualify** himself or herself in a proceeding in which the Judge's **impartiality** might **reasonably** be questioned and **shall disqualify** himself or herself in a proceeding in which disqualification is **required** by **law** or applicable **Supreme Court Rule**."

The Rules of Professional Conduct govern the conduct of lawyers practicing within the State of Louisiana. The Rules of Professional Conduct prohibit a lawyer from engaging in the representation of a client when a conflict of interest exist and otherwise provide guidelines for what is considered to be misconduct.

Thus, it is axiomatic and fundamental to our system of justice that an attorney cannot participate in any litigation where to do so would be in violation of the Rules of Professional Conduct. Equally, neither can a Judge continue to preside over a case when to do so would be in violation of the Code of

Judicial Conduct.[27] In other words, when a potential conflict exist either the lawyer or the judge must disqualify themselves when not to do so could result in the "appearance of impropriety."

A court has the authority to recuse a lawyer from a cause wherein the attorney's involvement constitutes misconduct. *Brasseaux v. Girouard*, 214 So.2d 401 (La 3rd Cir, 1968). When an attorney has a conflict of interest which prevents his involvement that conflict of interest extends to the attorney's law firm. *Brasseaux, supra*. Defense counsel has acknowledged under oath that he is attorney of record to all Judges of the 15th Judicial District Court. Further, defense counsel readily acknowledges that he and his firm continue to represent all Judges of the 15th Judicial District Court to the extent that he and his firm continue to represent said Judges throughout the course of the Appellate process, as the case of *State v. Cavazos* makes its way to the Louisiana Supreme Court. In this regard, in the *State v. Cavazos* matter is currently pending before the Louisiana Supreme Court. Consequently, defense counsel and his firm enjoy an intimate, personal and confidential attorney/client relationship with all of the Judges of the 15th Judicial District Court, said attorney/client relationship necessarily possessing all of the trappings typically attendant to any attorney/client relationship. Indeed, Judge Simon not only assumed such to be the case herein but further assumed Briney was doing the judges (clients) a **favor** in representing them. (Exhibit 5, p.14, ln.22). However, Briney has adopted the defensive position and has attempted to make the distinction that he and his firm's representation of the Judges of the 15th Judicial

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[27] As stated by the Louisiana Supreme Court in *In Re Lemoine*, 692 So. 2d 358 (La 1997) misconduct is not only that which is embodied in the rules. Specifically, the court stated: "misconduct is not delimited by statutes or the absence of statutes nor is it imperative that any given serious misconduct be specifically proscribed by the Canons of the Code of Judicial Conduct (which are promulgated by this Court under its rule making authority).

District Court is with respect to their "official capacity" as Judges. Moreover, while Briney has advised that he is allegedly charging the Judges $150 per hour for his services, $100 for his associates' services, and $50 for his paralegals' services, conveniently there exists no written Contract of Employment, no bill has been created, there exists no itemization of the work performed nor the charges incurred on behalf of the Judges and, for reasons known only to Briney and the Judges of the 15th Judicial District Court, no bill for services has been forwarded, thus, no request for payment made, notwithstanding the passage of nearly nine months since Briney's services were allegedly retained. There has been no explanation as to how it came about that Briney's services were retained, although information has it that there exists some sort of relationship between at least one of the Judges of the 15th Judicial District Court and Briney's partner (Charles Foret)[28]. Most astonishing, however, is the fact that the Judges of the 15th Judicial District Court would hire local counsel who practice law before them when the Judges have access to the services of the Louisiana Attorney General's Office (free of charge), or the services of one of the many thousands of lawyers practicing law within the State of Louisiana outside of the 15th Judicial District.

The underlying reason of any motion to recuse/ disqualify is a **relationship** that creates potential for bias, prejudice or interests. Indeed, it is only because of bias, prejudice or interest that a motion to disqualify can even be filed. How does bias manifest itself? According to the authority to recuse Judges (C.C.P. Art. 151) bias, prejudice and interest manifest and infiltrate our judicial system as a result of familial relations, **attorney/client relationships between judges and attorneys**, or any other bias, prejudice or interest in the cause or its outcome or **any other bias or prejudice in favor of or against a party**

[28] For whatever reason Charles Foret sat in on the Motion to Compel and Motion to Recuse yet made no meaningful contribution to either.

or a party's attorney.[29] Is not the "appearance of impropriety" created by the situation of a judge or judges having an interest in a cause to the extent that they are biased or prejudiced in favor of an attorney because the attorney is also their attorney?

The relationship between defense counsel and the Judges is precisely the issue and **only** issue. In this regard, this Court is directed to *State v. Johnson,* 529 So.2d 157 (La.App. 4th Cir. 1988). In *State v. Johnson,* a lawyer employed by a District Judge was prohibited from practicing within other Divisions of the same District Court because to do so violated the Rules of Professional Conduct and was thus unethical. In speaking to this issue, the Court stated:

> "Certainly allowing an attorney who currently receives a salary from the District Court to represent defendants appearing before Judges in that Court **could result in the appearance of impropriety, at the least.**" *Id,* page 157.

The rationale of the *State v. Johnson* Court was to the effect that the **relationship** created an opportunity for an otherwise improper influence and thus created the "appearance of impropriety". Some of the particular reasons articulated by the Court included potential indirect contact with the presiding Judge through another Judge and the potential for direct contact with the presiding Judge. In the instant situation, the potential for indirect/direct contact is much greater. Indeed, because of the relationship defense counsel and his firm not only have direct access to their clients, the Judges of the 15th Judicial District Court, but any contact between defense counsel and his firm and their clients (Judges) is allegedly privileged and confidential as asserted by defense counsel, a privilege certainly not attendant to

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[29]There exist no similar controlling statute dealing with disqualification of a lawyer.

the situation in *State v. Johnson*.[30] Nevertheless, in speaking to the unethical nature of such a situation, the Court in *State v. Johnson* stated:

> "Additionally, the Rules of Professional Conduct, which apply to all members of the Louisiana Bar Association, prohibit the attorney from engaging in the conduct disapproved by the judge in this case. Although this exact situation is not addressed by the rules, conflicts of interest are discussed and prohibited by Rules 1.7, 1.8 and 1.9. Certainly representing clients in a Court which currently pays one salary could easily result in an actual or, at least, perceived conflict of interest.

The Rules of Professional Conduct further provide that it is professional misconduct for an attorney to "state or imply an ability to influence improperly a judge." An attorney of record in one section of a Court, who represents a client in another section, is in a position to consciously or unconsciously imply that he is able to influence a judge. Attorneys should not be engaged in any activities which could result in violation of any of the rules governing professional responsibility." *Id. p.158.*

It is noteworthy to mention that the Court made note of the fact that there was no evidence in the record that the attorney in *State v. Johnson* had any direct contact with the trial judge. In this regard, the Court reasoned:

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[30] The true nature and extent of the attorney/client relationship existing between defense counsel and the Judges of the 15th Judicial District Court, including whether or not remuneration is expected or in the absence of which a favor is owed by the Judges to defense counsel is currently unknown due to defense counsel refusing to engage in discovery and the trial court=s error in depriving petitioner of the opportunity to discover such evidence.

> "However, for the policy reasons stated above, we feel a rule prohibiting [attorneys] from practicing before Judges in the Court where they are employed is necessary." *Id. p.158.*

As revealed by *State vs. Johnson* the issue was not whether or not a conflict, in fact, exists. Rather, the issue was whether or not the circumstances could give rise to the "appearance of impropriety". In the instant case the Law Firm of Briney & Foret and Patrick Briney are not mere law clerks. Rather, the Law Firm of Briney & Foret and Patrick Briney actually enjoy a relationship much more conducive to creating the "appearance of impropriety" to the extent that the relationship existing between the Law Firm of Briney & Foret and Patrick Briney with the Judges of the 15th Judicial District Court is that of attorney and client. Thus, unlike the law clerk in *State v. Johnson* who was merely receiving a salary from the District Judges, the Law Firm of Briney & Foret and Patrick Briney not only receive some form of remuneration but otherwise enjoy an intimate, personal and confidential relationship with the Judges of the 15th Judicial District Court as attorneys and client. In other words, if the potential influence of a mere law clerk for another Judge who is trying a case before a Judge other than his employer is deemed unethical and sufficient to warrant recusal how can any plausible and rational argument be made that the potential and likely influence of an attorney over his Judge/client or the influence of a Judge/client over his attorney be any less unethical or any less of an "appearance of impropriety?" Such a situation is not only unethical but untenable.

One of the practical effects of the current situation is that no matter who the Judge, every time the Law Firm of Briney & Foret is before the Court in a capacity as attorneys-of-record to a litigant other than the Judges of the 15th Judicial District Court, the attorney representatives of the Law Firm of Briney & Foret enjoy the unique, comforting and envious position, certainly not

available to their opponent, of making their case to a Judge who happens to be their client. While it is presumed that the Judges of the 15th Judicial District Court certainly would not allow themselves to be improperly influenced by the given situation, the fact remains that the current situation creates the "appearance of impropriety," at the very least.

Judge Simon's attempt to distinguish *State v. Johnson* reveals that either Judge Simon did not read *State v. Johnson* or is attempting to rewrite *State v. Johnson*. For example, it is not the existence of "some general language from which plaintiff takes comfort" pursuant to which plaintiff relies on *State v. Johnson*. Contrary to Judge Simon's assertions, the entire thrust of the opinion in *State v. Johnson* dealt with the potential for access between the attorney and the judges before whom he worked and received a salary thus creating the "appearance of impropriety." Indeed, there does not exist "some general language" which in any way supports Judge Simon's interpretation of *State v. Johnson*. The *State v. Johnson* opinion is short, well written and easily understood. Parenthetically, the issue is not whether Briney's representation of USAA herein and the judges are "distinct" and neither was such even remotely a consideration in *State v. Johnson*.

The Court is further directed to *In Re Cooks*, 694 So.2d 892 (La. 1997). In *Cooks*, the Louisiana Supreme Court disciplined a judge for, among others, failing to disclose an attorney/client relationship existing between the judge and an attorney. In speaking to the relationship present in *Cooks* the Louisiana Supreme Court stated:

> "Article 151B(2) mandates that if a judge has continued to employ to represent him personally an attorney who is also representing a party in a matter pending before that judge, the judge must disclose this representation to all the parties in a

> matter pending before him. This **mandatory** obligation exists so that all parties will have the **information** necessary to determine if they should request that the judge be recused. **Clearly, failure to make this disclosure when an attorney/client relationship exists could subject a judge to discipline.**" *Id. p. 900, 901.* (See also *In Re Lemoine*, 692 So.2d 358 (La. 1997).

The overriding concern throughout all of the aforementioned cases was the "**relationship**" between the judge and the attorney. Indeed, in *Cooks* the Supreme Court noted not only the frequency of the calls between the Judge and her attorney but the duration of the calls. The court further noted what was done by the attorney for the Judge during the relationship. Additionally, the Court noted the existence of a friendship between the Judge and attorney. In both *Cooks* and *Lemoine* the Supreme Court noted relationship issues concerning financial matters including financial matters between the Judge and attorney. Such is also the overriding concern herein. In fact, the nature, extent and scope of the attorney/client relationship herein is precisely the issue. Yet, as erroneously stated by Judge Simon, Briney's relationship with the Judges in the *State v. Cavazos* matter is "irrelevant" (See Transcript Exhibit 5).

As previously noted, defense counsel and his firm have advanced the argument that he and his firm represent the Judges of the 15th Judicial District Court in their "official capacities" as Judges as opposed to some other capacity. In doing so, defense counsel and his firm have attempted to distinguish the attorney/client relationship existing between defense counsel and his firm and the Judges of the 15th Judicial District Court from that of any other attorney/client relationship and in doing so has attempted to re-characterize the nature, extent and scope of the relationship. Parenthetically, the person of a judge is inseparable from that of the individual. In other words, there is no distinction

to be made between representing a judge personally in an "official capacity" and representing a judge personally in any other capacity. However, if any distinction is to be made it would certainly appear to create a greater "appearance of impropriety" to represent a judge in an "official capacity" to the extent that it is a judge who, while engaging in his "official capacity" rules upon the very cases in which the judge's personal attorney is also representing a civil defendant, as in this case. The following is an example of just how baseless and frivolous such a distinction actually exists in terms of real life situations and circumstances:

Hypothetical Telephone Conversation Between Patrick J. Briney And His Clients (Judges of The 15th Judicial District Court)

Patrick Briney:	Ring...ring...ring...
Judge Everett:	Hello?
Patrick Briney:	Glen?
Judge Everett:	Yes...
Patrick Briney:	Hi Glen, this is Pat...how are you my good friend?
Judge Everett:	Hey Pat...I'm doing fine...how are you?
Patrick Briney:	I can't complain...although I'm having to work more than I'd like especially since Simon is trying to disqualify me.
Judge Everett:	Yeah, that's an interesting situation, I'm told Ed dismissed the motion without even allowing a hearing.
Patrick Briney:	Yeah...we made Simon take writs to the Supreme Court...Of course, they reversed and remanded.
Judge Everett:	So I heard.
Patrick Briney:	Yeah...lucky for us they appointed Judge Anne Simon...she's made short shrift of Simon's motion...thank God she reversed her previous discovery ruling and didn't

allow Simon to take my deposition...I think I dodged a bullet there...

Judge Everett: Yeah, what's Simon going to do now?

Patrick Briney: Oh, if history is any indication, he'll take writs. We should be alright since Judge Simon denied Simon's motion and I did not have to disclose all of the details of our relationship.

Judge Everett: Well, Pat what can I do for you today?

Patrick Briney: I was calling about the situation in *State v. Cavazos*...are you wearing your official black judicial robe?

Judge Everett: Hold on...it's hanging right here...let me put it on...

Patrick Briney: That would be a good idea...(pause)

Judge Everett: Pat?

Patrick Briney: Yeah, Glen...

Judge Everett: Ok...I've got my official black judicial robe on.

Patrick Briney: Great, now we can talk about *State v. Cavazos* because, as you know, I only represent you all in your "official capacity." What are we going to do if the Supreme Court grants Attorney Block's writ?

Judge Everett: Hell...I don't know...we probably should get Judge Edwards on the phone since he has taken my place as chief judge.

Patrick Briney: Good idea...I happen to have his personal cell phone number right here, I'll try to conference him now. (pause)

Judge Edwards: Hello?

Patrick Briney: Jules...it's Pat...I've got Glen on the line.

Judge Edwards: Hey Pat...hey Glen...what's up?

Patrick Briney: I had called Glen to talk about *State v. Cavazos*.

Judge Everett: And I figured since you were now chief judge that we should get you on the phone.

Patrick Briney: You have your official black judicial robe handy?

Judge Edwards: I'm actually at the National Guard headquarters and don't have my official black judicial robe.

Patrick Briney: Well...you probably should participate because, as you know, I only represent you all in your "official capacity."

Judge Everett: Fortunately, Pat caught me at my office and I have my robe on.

Patrick Briney: Well, Jules...with your permission we'll continue to discuss *State v. Cavazos* without you. I'll give you a call later. Will you have your robe and shall I call you at home or on your cell phone?

Judge Edwards: I'll be home and yes I'll have my robe so we can talk then.

Patrick Briney: Great, we'll talk then. Bye Jules.

Judge Edwards: Bye Pat...bye Glen.

Judge Everett: Bye Jules.

Patrick Briney: Well, what next?

Judge Everett: Let's try to get Ed on the phone.

Patrick Briney: Good idea, I happen to also have his private cell phone number. Chances are, however, he'll be on the tennis courts and won't have his official black judicial robe handy.

Judge Everett: He sure does love that tennis! (pause)

Judge Rubin: Hello?

Patrick Briney: Ed, hello this is Pat, I've got Glen on the line.

Judge Rubin: Hey Pat, hey Glen...how you all doing?

Patrick Briney: Great.

Judge Everett: Working as usual...what are you doing, playing tennis?

Judge Rubin: Of course, I've got to practice...Chanda is coming home next week and I know she'll want to play. By the way Glen, do you think you can cover my cases so that I can play tennis with Chanda next week?

Judge Everett: Not a problem, next week is my office week.

Judge Rubin: Great. So what's up?

Patrick Briney: I was calling to talk about *State v. Cavazos*.

Judge Rubin: Is that the case where Simon is raising hell and trying to disqualify you?

Patrick Briney: Not exactly...Simon is trying to disqualify me in that civil case pending before you. Remember, you denied his motion without a hearing?

Judge Rubin: Oh yeah...*State v. Cavazos* is the one where Block is causing trouble.

Patrick Briney: That's right. Wouldn't it be nice if Simon and Block would just do like most others and let us do what we please?

Judge Rubin: Are you kidding? Simon is Minos' son and Block used to work for Minos.

Patrick Briney: I guess it's true what they say...the acorn doesn't fall far from the tree...Heaven help us.

Judge Rubin: Well, if we are going to talk about *State v. Cavazos* I'll have to get my official black judicial robe out of my Mercedes and put it on...hold on a minute. (pause)

Judge Rubin: Ok...let's talk.

Patrick Briney: Shouldn't we also get Tommy on the phone since he was primarily responsible

for establishing the misdemeanor department and in hiring me and my firm?

Judge Everett: Perhaps.

Judge Rubin: Yeah.

Patrick Briney: Good thing I also have his private cell phone number, I'll bet he's fishing or hunting with my partner. My how those two love to hunt and fish.

Judge Rubin: Almost as much as I love to play tennis, ha...ha...ha. (pause)

Judge Duplantier: Hello?

Patrick Briney: Tommy, Pat here, I've got Glen and Ed on the phone...what are you doing my good friend?

Judge Duplantier: Trying to teach your partner how to fish...might I add he's not learning very well.

Patrick Briney: Hell, he never works because he's either fishing or hunting, he should be a pro by now.

Judge Rubin: Where are you two fishing?

Judge Duplantier: In the Gulf, I'm surprised that you were able to reach me.

Judge Everett: Pat said you would be fishing...he knows you pretty well.

Judge Duplantier: Almost as well as his partner I'd expect. So what's up?

Judge Everett: Pat was calling to talk about *State v. Cavazos*

Patrick Briney: Did you happen to bring your robe fishing with you Tommy?

Judge Duplantier: No, I left it hanging in my office when I left Wednesday to come fishing.

Patrick Briney: Well, since I've taken the position with Simon that I only present you all in an "official capacity" it's probably best that

	we not talk without you wearing your robe, after all, when I testified, I took an oath.
Judge Rubin:	Ok then, I guess I can get back to my tennis game?
Foret (Briney's partner):	I've got a big one...get the gaff Tommy!
Judge Duplantier:	Gotta go guys...Charlie has finally caught a fish.
Patrick Briney:	Ok. Tell you what...how about we all get together at Ruth Chris' Steakhouse Sunday night...I'll reserve a private room. My treat! You all bring your robes...we'll eat dinner and then discuss what we will do next in *State v. Cavazos*.
Judge Everett:	See you all then. Bye bye.
Judge Rubin:	Can I bring Chanda?
Patrick Briney:	Certainly, I want an autograph.
Judge Rubin:	You got it...see you Sunday.
Judge Duplantier:	Adios.

There should exist little doubt but that the current situation of the Briney & Foret law firm representing the defendant herein and the judges of the Fifteenth Judicial District Court is unethical, untenable and creates the "appearance of impropriety." There is no logical distinction to be made between representing the judges personally in an "official capacity" and representing the judges personally in some other capacity. Indeed, there is absolutely no authority that requires that the attorney/client relationship be "personal" before an attorney may be disqualified. In this regard, the only determination to be made is whether or not the attorney/client relationship creates the "appearance of impropriety." In determining whether or not the "appearance of impropriety" exists an "objective" test is to be applied. Specifically, as stated by the Louisiana Supreme Court in *In Re: Chaisson*, 549 So.2d, 259 (La. 1989):

"Our inquiry does not end there, however. **The proper test of whether Judge Chaisson's actions gave the appearance of impropriety is an objective one: whether a reasonable person would be justified in suspecting that Judge Chaisson lent 'the prestige of his office to advance the private interest' of *Carmouche* [citations omitted].** The record establishes by clear and convincing evidence that Judge Chaisson's role in the settlement conference created the appearance of impropriety under this objective test. **It is highly unlikely that an ordinary citizen claiming to be a friend of Carmouche would have been made privy to the details of the settlement negotiations. In addition, since the matter settled on terms favorable to Carmouche shortly after Judge Chaisson's involvement, a reasonable person might well suspect that this was the result of some improper influence. This suspicion is made even more reasonable by the fact that the true nature of Judge Chaisson's involvement was not public and that's even more likely to be perceived as wrong doing. These factors alone were sufficient to establish the appearance of impropriety that weakens 'public confidence in the integrity of the judiciary' contrary to Canon II (A) by raising a reasonable person's suspicions that Judge Chaisson lent 'the prestige of his office'** to advance Carmouche's interest contrary to Canon II (B)." *id* p 263-264

Thus, the standard by which this issue should have been decided was an "objective" standard. Yet, as is clearly identified by the trial court's Written Reasons, the trial court did not apply an objective test. The objective test to have been applied was

whether a reasonable person would be justified in being suspicious about the instant attorney/client relationship between defense counsel and the judges of the Fifteenth Judicial District Court. Clearly, any person, either professional, lay person or otherwise should be extremely suspicious about an attorney trying cases before a judge who is also the attorney's client. What **reasonably** objective person wouldn't? Yet, no such objectivity factored into the trial court's analysis. Instead, the trial court reasoned:

> "The **standard** to be applied by the court appears to be found in general principles of professional responsibility, with guidance from the ABA Model Rules of Professional Conduct and the Louisiana Rules of Professional Responsibility." (Written Reasons, p.4)

As revealed by the court's Written Reasons, no objective consideration factored into the trial court's analysis. In this regard, the trial court focused on issues having nothing to do with an objective analysis. Specifically, the court stated:

> "In the instant matter, the two representations are distinct; neither has any bearing on the other. The plaintiff has not indicated that there is any possibility that Mr. Briney would take a position in one representation different from that in the other, nor that the interest of the client in the misdemeanor probation program (the judges) could conflict with the interest of the defendant (the uninsured motorist insurer) in this personal injury suit." (Written Reasons, p.4).

Again, the issue is only whether or not the "appearance of impropriety" is created by virtue of the attorney/client relationship and not whether or not the judges' interests in the misdemeanor

probation program conflicts with USAA's interest in this personal injury suit. Clearly, the trial court's reasoning resides well within the bosom of subjectivity. The "appearance of impropriety" in this case is overwhelming. What reasonably objective person would not find the circumstances herein suspicious? The Judges of the 15th Judicial District Court have absolutely no need to hire any lawyers especially not lawyers who practice within their jurisdiction. Indeed, the Court can take judicial notice of the many exceptionally qualified attorneys practicing law within the State of Louisiana, not to mention the availability of the Attorney General and his assistants whose primary function is representing the State of Louisiana and its elected officials. However, for reasons known only to the Judges of the 15th Judicial District and their attorney, defense counsel herein, the decision was made by all of the Judges of the 15th Judicial District Court to hire defense counsel herein and defense counsel and his firm have so performed as attorneys of record to the Judges of the 15th Judicial District. The effect of all of this nonsense is that not only has the "appearance of impropriety" been created but there has been a violation of both the Rules of Professional Conduct and the Code of Judicial Conduct, not the least of which is the violation of Canon II that prohibits a Judge from "conveying or permitting others to convey the impression that they are in a special position to influence the Judge." By virtue of the attorney/client relationship between the Judges of the 15th Judicial District and defense counsel and his firm, the message is clearly conveyed and the impression indelibly made that defense counsel and his firm occupy a special position (the chosen few) and enjoy a level of influence with the Judges not available to other attorneys. These circumstances cannot be analyzed in a vacuum. In the real world it must be accepted that there exist some underlying reason why the Judges of the 15th Judicial District, who do not need legal representation, would nevertheless hire defense counsel and his firm. It is respectfully submitted that no one can imagine the level of suspicion created in the minds of the litigants who appear before the Judges of the 15th Judicial District Court and know that

the Judges are also clients of the defense counsel sitting across the table. If "an independent and honorable judiciary is indispensable to justice in our society" as stated by Canon I, means anything and "public confidence in the integrity of the judiciary" as referenced in Canon II means anything then the current circumstances cannot be allowed to stand.[31] It is respectfully submitted that Judge Simon abused her discretion in not only failing to employ the objective test as the law mandates but further committed error and abused her discretion by employing what is clearly a subjective and arbitrary test pursuant to which no litigant could ever expect to succeed.

Lastly, the court is directed to *In Re: Lemoine*, 692 So.2d 358 (La. 1997). *In Re: Lemoine* involved judicial discipline against a judge that had refused to recuse himself from cases in which parties were represented by attorneys with whom the judge had association. Many of the cases were criminal and many were civil. While noting the distinction between the permissive recusal provided by C.C.P. Article 151 and the mandatory recusal provided by C.CR.P. Article 671, the Louisiana Supreme Court stated:

> ". . . A Judge's not recusing himself in a case in which a party is represented by an attorney with whom the Judge is associated, may, if sufficiently serious, constitute the punishable misconduct contemplated by and described in the Louisiana Constitution. It is true, of course, that there was in this case no distinctly applicable ethical cannon or statutory mandate, no 'shall be recused' provision in the Code of Civil Procedure, Art. 151(B), regarding civil recusal, as is found in

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[31]Other than the lawyers employed at Briney & Foret and the judges of the Fifteenth Judicial District Court including Judge Anne Simon, every other lawyer whether assistant prosecutor, defense attorney and/or plaintiff attorney, has expressed outrage about the given circumstances of this case.

Article 671 of the Code of Criminal Procedure. **On the other hand, constitutional misconduct is not delimited by statutes or the absence of statutes, nor is it imperative that any given serious misconduct be specifically proscribed by the Canons of the Code of Judicial Conduct (which are promulgated by this Court under its rule making authority). If there is misconduct as defined in the constitution, it is irrelevant that no statute or ethical canon has specifically been violated.**

The Judge's clear violation of a statute is misconduct, because it is a Judge violating the law, and such disobedience or disrespect for the law, which his very oath commands that he supports, constitutes 'willful misconduct relating to his official duty,' Article V Section XXV(C) of the Constitution. Such a statutory violation would also constitute an ethical breach under Canon II of the Code of Judicial Conduct . . .

On the other hand, violation of law is not a necessary prerequisite for finding misconduct warranting judicial discipline. Rather, even absent deviation from some statutory provision (or for that matter, absent the violation of a Canon of the Code of Judicial Conduct), a Judge's misconduct may be so serious as to constitute that type of 'willful misconduct relating to his official duty, willful and persistent failure to perform his duty, [or] persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . .' and warrant

discipline under Article V, Section 25(C).

From this we see that the absence of a statute ordering a Judge to recuse himself, and the absence of a pertinent ethical canon, does not insulate that Judge from discipline for not recusing himself in a civil case, contrary to what we said in our original opinion. For instance, C.C.P. Article 151(B) may not recite, as does C.CR.P. Article 671, that a Judge 'shall be recused' for any of the enumerated grounds, but his conduct in sitting in such a case may well constitute conduct that brings the office into disrepute, and be of such a serious nature as to warrant discipline. Our comment above is applicable to what is involved in this case, C.C.P. Art. 151(B)(1) - a judge's association with an attorney during the attorney's employment in the cause, if such misconduct is serious and so improper as to constitute 'willful misconduct relating to his official duty, willful and persistent failure to perform his duty, [or] persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *id p.*359-360

It is respectfully submitted that all of the cases cited herein by plaintiff stand for the proposition that at all costs the integrity and independence of the judiciary is to be preserved. Simply put, the issue herein is whether or not an attorney/client relationship exists (which we know one does) and whether or not the "appearance of impropriety" is created. From an objective standpoint, a person would have to be deaf, dumb, and blind not to be suspicious about the instant circumstances. Indeed, plaintiff herein is not only suspicious but completely disgusted in knowing that she is forced to litigate her case before a judge of the

Fifteenth Judicial District Court who also happens to be the client of defense counsel who will be sitting across the table at the time of trial. It is respectfully submitted that such a situation represents a formidable indictment upon our system of justice and the lofty ideals of fairness, judicial integrity and judicial independence. Unless Judge Simon is reversed, the citizenry of Acadiana indeed, society as a whole, would be well within its right to hold the legal profession and judiciary of the State of Louisiana in disrepute.

CONCLUSION

Judge Simon's denial of plaintiff's motion to disqualify defense counsel is clearly erroneous. Judge Simon's denial of plaintiff's Motion to Disqualify Defense Counsel exists without a basis in fact or law. Judge Simon's denial of plaintiff's Motion to Disqualify Defense Counsel is based upon an erroneous interpretation of controlling jurisprudence and a misstatement of fact. For example, although Judge Simon states in her written reasons that "the only provision of Article 151 which either party contends [is] applicable in the instant matter is that found in subparagraph (2)," such is not correct. First of all, C.C. P. Article 151 speaks to the recusation of judges and is only applicable to the extent of providing guidance as persuasive authority. In this regard, there is no counterpart to C.C.P. Article 151 regarding recusation of judges that applies to the recusation of defense counsel. Nevertheless, the persuasive authority of subparagraph 5 of C.C.P. Article 151 is also applicable. Further, while Judge Simon states in her written reasons that "plaintiff does not contest the testimony of Mr. Briney, supported by defendants' exhibit 2 that he has no other legal relationship with any of the judges of the Fifteenth Judicial District Court," such could not be further from the truth. As revealed at page 89 beginning at line 5 of the hearing transcript, plaintiff's undersigned counsel clearly communicated to Judge Simon that he could not agree with such a statement. As revealed by the transcript of plaintiff's Motion to Compel, Judge Simon would not allow evidence of the nature and

scope of the attorney/client relationship; would not even allow discovery of any information concerning past or present relationships yet, misrepresents that plaintiff's counsel does not contest that there were no other legal relationships. Plaintiff disputes whether or not there existed other relationships but was prevented from proving such because Judge Simon denied plaintiff's Motion to Compel advising then that any such information was not relevant. Moreover, and equally disturbing is the fact of Judge Simon having relied on the absence of the very evidence she would not allow plaintiff to discover as the basis for her ruling. Specifically, as revealed on page 4 of Judge Simon's written reasons, Judge Simon noted the "[absence of] any evidence of any relationship between Mr. Briney and the judges, other than that occasioned by the usual legal responsibility," the absence of which was due to Judge Simon deeming such evidence to be irrelevant (Exhibit 5) which resulted in Judge Simon denying plaintiff's discovery motion seeking production of such evidence.

November 5, 2001 stands to be a historic day in our jurisprudence. It was only as a result of ignoring controlling jurisprudence, judicial canons, attorney ethics and applying the wrong standard (subjective) that the trial court was able to deny plaintiff's motion. The trial court's erroneous approach to this matter is best expressed by the court at page 4 of the Written Reasons:

> "In this regard, the plaintiff also argues in favor of an expansion of the requirements for recusation of [an] attorney. He asserts that recusation should be required whenever the attorney has any other representation of Judges because representation allows special access. If that were to be the law, by the same reasoning we would be led to an examination of all contacts between judges and the attorneys who practice in their courts. Upon election, judges would be forced to remove

themselves from the world."

In other words, our jurisprudence, judicial canons and professional ethics that seek to lend validity to such noble concepts as the indispensability of an independent and honorable judiciary (Canon I); integrity and independence of our judiciary must be preserved (Canon I); and, public confidence in the integrity and impartiality of the judiciary (Canon II), mean absolutely nothing when it comes to promoting and allowing good ole' boy relationships; the very relationships that create and promote public distrust and serve only to impugn and denigrate the integrity of our judicial system.

Neither the plaintiff nor plaintiff's undersigned counsel argues for an expansion of the requirements for the recusation of attorneys, contrary to Judge Simon's assertion. Indeed, plaintiff and plaintiff's undersigned counsel merely request that the law, judicial canons and professional ethics be followed and applied in this case. Quite frankly, what Judge Simon deems to be an unworkable dilemma is actually required by the Judicial Canons of Ethics and the law of the State of Louisiana. The supercilious suggestion that upon election, judges would be forced to remove themselves from the world is an assault upon the integrity and impartiality required of our judiciary. To the contrary, upon election, only judges that arbitrarily refuse to uphold the law and who refuse to adhere to that which is required to preserve the independence of the judiciary and to promote public confidence in the integrity and impartiality of our judiciary should be removed, not from the world, but from public office.

Respectfully Submitted:

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APPENDIX H

AMERICAN BAR ASSOCIATION OPINION

ABA Informal Op. 1331
ABA Comm. on Ethics and Professional Responsibility.
Informal Op. 1331

American Bar Association

REPRESENTATION OF JUDGES BY ATTORNEYS WHO APPEAR BEFORE THEM

June 25, 1975

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Your advise that your firm has been requested by the appropriate court administrator to represent various members of the judiciary of your Commonwealth in actions brought against them under various federal statutes, including, presumably, Title 42, United States Code, Section 1983, and possibly under similar state legislation. Such representation would be on a continuing basis for a modest but compensatory fee paid from public funds, and is necessitated by reason of a recent ruling of the attorney general of the Commonwealth declining to follow the practice of his predecessors of providing defense of such members of the judiciary through his office.

In essence, you inquire as to the propriety of your firm continuing on occasion to appear before such members of the judiciary whom you might then simultaneously be defending on such basis. You invite attention to Pierson v. Ray, 386 U.S. 547 (1967), and similar cases indicating, at least from a federal

standpoint, that there is at best only a narrow range of situations in which a judge might actually be held to be personally liable for money damages, although damages in large amounts are sometimes sought. You, however, also note that there invariably is at least an intangible interest on the part of any judge in having his actions vindicated. We note, of course, that in no circumstances is your firm undertaking the defense of any disciplinary proceeding which might be brought against a judge.

In evaluating the inquiry from the standpoint of your particular city we presume that there are a considerable number of judges potentially susceptible to being so represented, and that your firm is likely at any given time to be confronted with the real possibility of having litigation before any one of these judges. The number of judges available would also suggest that there is a substantial possibility that cases could be transferred to avoid the problem in question. Furthermore, the number of lawyers in your community with trial experience suggests that if a transfer could not be effected without undue difficulty, the judge in question could likely be referred to other experienced counsel. Of course, the ease of transfer or retention of other counsel would be less in a smaller community.

You correctly point that there is no clearly controlling provision of the Code of Professional Responsibility relating to this problem. We also conclude that no reference in the Code of Judicial Conduct clearly relates to any duty which the judge might have under these circumstances. However, in the light of the sensitive problem in question, we think it appropriate in this instance to address ourselves to the issue from the standpoint of the Ethical Consideration of the Code of Professional Responsibility.

We noted in a different context in our recent Informal Opinion 1306 that although guidance to the court in respect to circumstances in which it must disqualify itself is found in Canon

3C(l), Code of Judicial Conduct, the matter in the final analysis is left to the good judgment and conscience of the individual judge rather than presenting an ethical problem for the lawyer. That opinion, however, related to the appearance before the court of members of the judge's former firm, which still represented him. The instant situation is distinguishable because your firm would probably be in a position to make advance arrangements through the court administrator to avoid the problem where counsel for a single judge, as in Informal Opinion 1306, might not be able to do so.

However, certain ethical precepts in the Code of Professional Responsibility do furnish guidance. For example, Canon 9 itself admonishes that 'A lawyer should avoid even the appearance of professional impropriety.' It is debatable whether serving in the capacity suggested is to be regarded as fulfilling the role of a part-time public officer. However, it is suggestive of the aspirational level of conduct suggested by the Code of Professional Responsibility that Ethical Consideration 8-8 suggests that 'A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.' Obviously, contrary policy arguments can be made that this practice ought not to be discouraged by imposition of undue burdens upon counsel willing to undertake a commendable and often arduous task.

Under the described circumstances, we conclude that the portions of the Code of Professional Responsibility relating to the avoidance of the appearance of impropriety suggest that in many instances it would be preferable for your firm not to appear before a judge who is then being represented by you in these circumstances. Of course, it would be advisable, if possible, to effect an advance agreement with the court administrator establishing a procedure to avoid any conflicting representation.

ABA Informal Op. 1331

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE LOUISIANA SUPREME COURT RULE 19, § 18 (B)

Proceedings Governed by the Code of Civil Procedure and the Code of Evidence

Except as otherwise provided in these rules, the Louisiana Code of Civil Procedure and the Louisiana Code of Evidence apply in discipline and disability cases. No provision of the Louisiana Code of Evidence shall prevent

the introduction of sworn testimony from social security hearings, trials, or hearings of a contradictory nature where the respondent has cross-examined or had the opportunity to cross-examine the witnesses whose testimony is sought to be introduced.

THE LOUISIANA SUPREME COURT RULE 19, § 18 (C)

Standard of Proof

Formal charges of misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence.

THE LOUISIANA SUPREME COURT RULE 19, § 18 (D)

Automatic Reinstatement from Interim Suspension upon Reversal of Conviction

An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his suspension but the reinstatement will not terminate any disciplinary proceedings then pending against the attorney.

THE LOUISIANA RULES OF PROFESSIONAL CONDUCT, RULE 8.2 (a)

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

L.S.A. - C.C.P. ART. 151 (B) (2) (5)

(B) A judge of any court, trial or appellate, may be recused when he:

(2) At the time of the hearing of any contested issue in the cause, has constituted to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in this case the employment shall be disclosed to eachparty in the cause;

(5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

THE LOUISIANA CODE OF JUDICIAL CONDUCT:

Cannon I: A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Cannon II: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of

the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Cannon III: A Judge should Perform the Duties of the Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the

adversary process.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.